In the United States
Circuit Court of Appeals
For the Ninth Circuit.

THE LUER PACKING COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., Defendant and Respondent. No.

MERCHANTS PACKING COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., et al., Defendants and Respondents. No.

UNION PACKING COMPANY, a corporation, Plaintiff and Appellant,
vs.
E. M. COHEE, etc., et al., Defendants and Respondents. No.

STANDARD PACKING COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., et al., Defendants and Respondents. No.

MAX GOLDRING, doing business under the firm name and style of GOLDRING PACKING COMPANY, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., et al., Defendants and Respondents. No.

UNITED DRESSED BEEF COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., et al., Defendants and Respondents. No.

CORNELIUS BROTHERS, LTD., a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., Defendant and Respondent. No.

ARMOUR & COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., Defendant and Respondent. No.

Reply Brief of Appellants Upon Application for Injunction Pending Appeal.

(Continued on Inside Cover.)

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Reply Brief of Appellants Upon Application for Injunction Pending Appeal.

Separate petitions and briefs were filed in the cases above listed, all of which involve applications by packers for an injunction pending appeal from an order of the District Court of Southern California vacating a temporary injunction heretofore issued. The attorneys for the various petitioners have just been served with copies of a brief which is being filed on behalf of defendant and, with a view to clarifying the issues as far as possible in the short time available prior to the hearing, petitioners beg leave to file this joint brief in the above cases as the reply of each petitioner to the said brief of defendant.

While several statements appear in defendant's brief which seem to us to be misleading, we desire to call the attention of the court at this time to a statement which appears throughout defendant's brief and which is at entire variance with the facts. Defendant's counsel states repeatedly that the District Court denied the application for injunction pending appeal. It is argued that the determination so arrived at by the District Court should not be overturned by this court. The trial court's order, which is set out in the petitions, expressly provided:

> "That, in view of the action had and taken by the United States Circuit Court of Appeals for the Ninth Circuit in the matter of petitions submitted to it for injunction pending appeal in matters involving processing taxes under the Act of Congress popularly known as Agricultural Adjustment Act, it is the expression of this court that any relief in the form of supersedeas, whereby the temporary injunction here-

> tofore granted and dissolved by the order appealed from, be restored to full force and effect during the pendency of the appeal, *should be pursued by the plaintiff in the form of an application for an injunction pending appeal to be presented to said United States Circuit Court of Appeals for the Ninth Circuit* if the plaintiff wishes to secure such relief."

No other order, ruling or decision was made or announced by the trial court in connection with an injunction in the proceedings pending appeal. It also appears conclusively from the record that the trial court not only did not deny petitioners' application but deliberately failed to pass upon the same and in lieu thereof expressly directed petitioners to pursue such application in this court. Petitioners are now endeavoring to comply with said direction.

In the following portions of this brief by the term "petitioner," we shall refer to all the applicants above named.

We shall point out in this brief that

I. The showing made by petitioner of circumstances justifying equitable relief and of the facts relating to the application of the processing tax in question has not been controverted in any manner by affidavit, pleading or otherwise by defendant and stands ~~amended.~~ admitted

II. The order of the trial court vacating the temporary injunction and also his order in which he directed that petitioner pursue the present application before this court

was made solely upon the ground that the decision of this court in the *Fisher Flouring Mills* Case constituted a mandate from this court which prevented the trial court from exercising independent judgment or discretion in connection with such applications.

III. Prior rulings of the trial court, by which it was determined that the complaint stated a cause of action for relief in equity and that equity had jurisdiction, remain in full force and effect.

IV. An injunction pending appeal should be granted in this case in order to preserve the status, and especially in view of the fact that the legislation involved is subject to more than one construction is of doubtful validity and expressly provides that the remedy to which it remits the processor is contingent upon the final determination of the invalidity of the Agricultural Adjustment Act.

V. The prohibition of Section 3224 of the Revised Statutes and also the prohibition contained in the Agricultural Adjustment Act as amended against the prosecution of injunction suits to enjoin the collection of taxes does not apply to the situation presented by the present case where the showing of the inadequacy of the remedy at law and irreparable injury brings the case within a recognized head of equity jurisdiction under the rule of *Miller v. Standard Nut Margarine Co.,* 284 U. S. 498.

VI. Petitioner has no adequate remedy at law by way of suit for refund of taxes paid.

VII. The fact that under the amendments there is no accurate method for computing petitioner's damage, and that the amount cannot be adequately proved, in itself requires equitable relief against the exaction of illegal levies.

VIII. The practical operation of the amended Act will result in a multiplicity of suits or at any rate a multiplicity of causes which will constitute that needless, vexatious and interminable litigation from which it is in the power of equity to grant relief.

IX. Plaintiff is properly in a court of equity. It has done equity throughout and has in every manner safeguarded the rights of the defendant. Defendant can suffer no harm by reason of the granting of the relief prayed for pending appeal.

X. Defendant's contention that plaintiff has been guilty of laches is entirely without basis in the record. No facts are present showing what defendant has done to conserve funds collected or to be collected in view of the apparent illegality of the Act.

XI. Answer to miscellaneous contentions of the defendant.

I.

The Showing Made by the Petitioner of Circumstances Justifying Equitable Relief and of the Facts Relating to the Application of the Processing Tax in Question Has Not Been Controverted in Any Way by Affidavit, Pleading, or Otherwise by Defendant and Stands Admitted.

The trial court on two occasions in which the question of the constitutionality of the Agricultural Adjustment Act was presented to it, held adversely to the defendant. The trial court, at the time of the granting of the temporary injunctions and in denying the motions to dismiss, adopted the minute order of Judge James in the Luer Packing Company case, in which he stated that "there is grave doubt as to the constitutionality of the Act." The senior judge further stated, "The court also concludes that the facts alleged show unusual and exceptional conditions warranting the issuance of an injunction, exclusive of any consideration of the fact that Congressional action is threatened which may deprive plaintiff of any right of action at law, as to which allegation of fact it is believed the court can give small weight because of its speculative and conjectural character."

II.

The Order of the Trial Court Vacating the Temporary Injunction and Also That Court's Order in Which It Directed That Petitioner Pursue the Present Application Before This Court Was Made Solely Upon the Ground That the Decision of This Court in the Fisher Flouring Mills Case Constituted a Mandate From This Court Which Prevented the Trial Court From Exercising Independent Judgment or Discretion in Connection With Such Applications.

The order vacating the temporary injunction, being the order of August 30, 1935, upon its face clearly and definitely shows and demonstrates that the temporary injunction was vacated for no other reason except the concept of the lower court that the decision of August 15, 1935 was a mandate to it to vacate injunctions in processing tax cases.

It is equally clear from the order allowing the appeal that the lower court, feeling itself bound by the mandate expressed in the order of August 15, 1935, expressly felt that all further relief, ~~in view of the expressions of~~ should come from the Circuit Court of Appeals, for the lower court apparently felt that to grant relief pending appeal would be tantamount to an avoidance of the mandate it felt was contained in the decision of August 15, 1935, denying an application for injunction pending appeal.

The difference between the facts presented in the present applications and the showing made by the applicant in the *Fisher Flouring Mills Company* case, also the important differences between the refund law as it stood on that date and as it has stood subsequent to August 24, 1935, have

been pointed out in the briefs heretofore filed. In view of these differences, both in the showing contained in the application and in the law governing the remedy of the claimant, the oft repeated assertion of defendant's counsel that the *Fisher Flouring Mills* case precludes the court from an independent consideration of the merits of the pending applications, is entirely unwarranted.

As impliedly held by this court in the *Fisher Flouring Mills Company* case, and directly held in previous decisions of this court, such as *Skagit County v. Northern Pac. Ry. Co.*, 61 Fed. Rep. (2d) 638, and consistent with the rule as announced in *Miller v. Standard Nut Margarine Co.*, the showing of the inadequacy of the remedy presents a recognized head of equity jurisdiction and the collection of the taxes will be enjoined.

It is not true, as stated several times in the brief of defendant, that the District Court in connection with the application for rehearing filed by plaintiffs, made any other or different order than as above referred to which had to do solely with the mandatory nature of the holding in the *Fisher Flouring Mills* case. Therefore, the District Court did not have before it, as asserted by counsel, all matters now before this court. Leave was granted to file supplemental complaints at the date of the application for rehearing and after the application for rehearing had been denied, the petitioners filed supplemental complaints. The supplemental complaints themselves, however, were not considered, nor did the court render any decision except to deny a rehearing of its ruling on the motion to vacate, its denial being based solely upon the mandate directed to it by this court in its decision in the *Fisher Flouring Mills* case.

III.

Prior Rulings of the Trial Court, by Which it Was Determined That the Complaint Stated a Cause of Action for Relief in Equity and That Equity Had Jurisdiction, Remain in Full Force and Effect.

The order of August 30, 1935 appealed from dealt solely with the question of the mandate contained in the opinion denying injunctive relief pending appeal in the *Fisher Flouring Mills* case. No appeal has been taken by the Government from the orders previously made denying the motion to dismiss and holding that the plaintiffs were properly in a court of equity and entitled to equitable remedies. We have reference now to the particular order appertaining to each cause, practically all of which by reference also adopted the opinion of the Senior District Judge as a part thereof. Furthermore, subsequent to August 30, 1935 defendants herein have applied for and received an order extending their time to plead to the complaints on file.

IV.

An Injunction Pending Appeal Should be Granted in This Case in Order to Preserve the Status, and Especially in View of the Fact That the Legislation Involved Is Subject to More Than One Construction, Is of Doubtful Validity and Expressly Provides That the Remedy to Which it Remits the Processor Is Contingent Upon the Final Determination of the Invalidity of Agricultural Adjustment Act.

There is little that can be added to the statement contained in the dissenting opinion of Judge Denman dated August 15, 1930 which can more clearly demonstrate the necessity of and propriety of injunctive relief in these causes, except to point out that since that decision the Act in question has been amended by the adoption of a number of provisions affecting the remedy of petitioner, which provisions are not only of doubtful meaning but even of doubtful validity and which expressly provide that the exercise of the remedy of the petitioner under the amendments is contingent upon the final determination of the invalidity of the Act.

V.

The Prohibition of Section 3224 of the Revised Statutes and Also the Prohibition Contained in the Agricultural Adjustment Act as Amended Against the Prosecution of Injunction Suits to Enjoin the Collection of Taxes Does Not Apply to the Situation Presented by the Present Case Where the Showing of the Inadequacy of the Remedy at Law and Irreparable Injury Brings the Case Within a Recognized Head of Equity Jurisdiction Under the Rule of Miller v. Standard Nut Margarine Co., 284 U. S. 498.

It is well established that plaintiff's right to injunctive relief is not barred by the provisions of section 3224 of the Revised Statutes if a showing is made of the inadequacy of the legal remedy or of other circumstances bringing the case within a recognized head of equity jurisdiction.

Miller v. Standard Nut Margarine Co., 284 U. S. 498;

Skagit County v. Northern Pac. Ry. Co., 61 F. (2d) 638.

By parity of reasoning the provisions of section 21 (a) of the amendments to the Act are not to be considered as an absolute bar to injunction suits. As stated in *Miller v. Standard Nut Margarine Co., supra,* it would require special and particular provision to acquire a construction which would prohibit resort to the relief which equity

affords in cases of inadequacy of legal remedy or other exceptional circumstances. The provisions of section 21 (a), by reason of the fact that they are worded in almost the same language as that to be found in section 3224 of the Revised Statutes, are under the accepted rule of construction to be considered as a re-enactment merely of the statute.

Heald v. District of Columbia, 254 U. S. 20.

If, on the other hand, section 21 (a) is to be construed as an absolute bar to injunction suits, it is unconstitutional if, under the circumstances set forth in the application, petitioner is powerless to enjoin the collection of the tax, it is deprived of all substantial remedy and, furthermore, it is denied equal protection of the laws and its property is confiscated in violation of the Fifth Amendment.

Graham & Foster v. Goodcell, 282 U. S. 409;

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673.

Undoubtedly, however, the section should be given the construction which will render it constitutional, that is, if it is possible to give the section the same construction as that of section 3224 of the Revised Statutes.

Furthermore, section 21 (a) of the amendments prohibiting injunction suits does not purport to apply to taxes imposed prior to the date of the amendment.

VI.

Petitioner Has No Adequate Remedy at Law by Way of Suit for Refund of Taxes Paid.

The amendments to the Act, as introduced in the House, purported to take away altogether the right to sue for refunds. These provisions were changed by the Senate, and again changed by the conferees of both bodies. *It is petitioner's contention that the effect of the particular amendment, as actually passed, is to deny to the taxpayer the right to recover taxes illegally imposed just as completely as if the amendment had been adopted in its original form,—that is, as an absolute prohibition against recovery.*

Defendant asserts. at page 31 of his brief, that the remedy at law under the amendments is "none the less complete." The provisions of the Act, as amended, are not novel.

The *Gebelein* case held that amendments of this sort, if passed, would be sufficient to warrant a Court of Equity in issuing an injunction against the collection of the tax, the court saying, that the effect of these amendments "will be to withdraw altogether the right of the payers of this tax to sue for the recovery thereof or to impose *substantially* restrictive provisions on the right of the taxpayer to recover in such case despite the possible finding that taxes were illegally required to have been paid," and referred to the amendments as "a *distinct departure* from the long established policy of the Government with regard to recovery of taxes illegally exacted."

This departure from what has heretofore been regarded as an adequate remedy at law for illegally collected taxes is startling in several particulars.

In the case of taxes other than the processing taxes, persons paying the tax demands against them are entitled

(a) To bring suit against the Collector who received the tax (*United States v. Bird, Emery, Thayer Realty Company,* 237 U. S. 28), or his personal representative in the event of his death (*Patton v. Brady,* 184 U. S. 608).

(b) To bring suit against the United States in the District Courts of the United States, with certain limitations as to the amount in controversy (Sec. 41, para. 20, Title 28, U. S. C. A.), or

(c) To bring suit against the United States in the United States Court of Claims (Sec. 250, Title 28, U. S. C. A.).

Although in every instance it is required that a claim for refund shall be first filed with the Commissioner of Internal Revenue, and a waiting period of six months thereafter is required, to allow time for administrative consideration of the claim, the claimant is entitled to, and in fact must, prove his entire claim *de novo,* having only the burden of proving that the Commissioner's tax assessment was erroneous, and that the tax was not in fact due (*United States v. Anderson,* 269 U. S. 422; *Reinecke v. Spalding,* 280 U. S. 227).

The marked dissimilarities of procedure between the remedy provided by the amendments and the provisions governing suits for refund of income, estate and gift taxes illustrate clearly the entire inadequacy of the remedy to which the processer is remitted. In the cases of income, estate and inheritance taxes, the Board of Tax Appeals function *before* payment of the tax is required and tax-

payers are not bound to contest the tax before the Board of Tax Appeals, but may elect to pay the tax and pursue their remedies by suits for refunds in the courts; the Board of Tax Appeals is a separate and independent Federal agency outside the Treasury Department—the tax determining agency; and the Board sits in review of the determinations of law made by the Commissioner of Internal Revenue and hears and decides the case upon evidence *de novo,* as in suits in the District Courts (See *International Banding Machine Co. v. Commissioner,* 37 F. (2d) 660). The Board, in making the record reviewable by the courts, functions as does a District Court. It receives the case upon pleadings made pursuant to Rules of Practice, and receives evidence in accordance with the rules applicable to suits in equity in the Supreme Court of the District of Columbia. (See *Phillips v. Commissioner,* 283 U. S. 589, 595, 596.) The Board issues subpoenas, both to private parties and to the Commissioner of Internal Revenue, supervises the taking of depositions, and in all respects functions as independently of the taxing authorities as do the courts. It is required to make findings of fact and conclusions of law in deciding cases before it, and its opinions are officially reported. (Chapter 22, Sections 1211-1230, Title 26, U. S. C. A.)

In contrast, processing-tax payers must make their proofs at such informal hearings as the Commissioner shall see fit to prescribe, and before such of the employees of the Bureau of Internal Revenue as he may designate. Presumably (as indicated in paragraph (e) of section 21), employees of the Commissioner will make so-called field examinations of the accounts and records of the processing-tax payers, and these *ex parte* reports

will be part of the record before the court, something never permitted in cases of other taxpayers. The Commissioner, in apparently unlimited administrative discretion, may receive *ex part* affidavits and deny all rights of cross-examination of witnesses, or of his employees. It is difficult to conceive of a more incomplete, inadequate, or confused procedure then that authorized by section 21 of the amendatory legislation. Under these circumstances the meager powers vested in the courts by the amendments fall far short of providing the judicial determination guaranteed by the Constitution.

12 *Corpus Juris,* 1241;

Pacific Live Stock Company v. Lewis, 241 U. S. 440;

Porter v. Investors Syndicate, 286 U. S. 461;

Phillips v. Commissioner, 283 U. S. 589;

Crowell v. Benson, 285 U. S. 22;

Chicago, B. & Q. R. Co. v. Osborne, 265 U. S. 14.

The constitutional right to jury trial, which exists in tax refund cases (*Garnhart v. United States,* 16 Wall. 162), is denied. A dependent governmental official is constituted both judge and jury and the record of the cause is made by him.

Entirely aside from constitutional objections and the question of the lack of due process, it is obvious that the remedy to which the processer is confined by the amendments is not sufficiently complete, adequate or available to meet the situation which faces the processor.

It may be suggested that the court should assume that the Commissioner will make provisions for proper judicial determination of the questions of fact and law, but it is

submitted that rather than subject petitioner to the risk of irreparable injury through failure of an adequate remedy at law, it is necessary to maintain the injuction until the doubts and difficulties created by the Act have been cleared up and appropriate administrative procedure established.

In any event, the portion of section 21 as amended which bars petitioner from recovering processing taxes which it cannot prove have been passed on to others is without justification.

The Collector may not, in a court of equity, resist a suit brought to enjoin him from illegal seizure of petitioner's property, upon the ground that petitioner has exacted or will be able to exact, an equal amount from the petitioner's vendee or some other person. (Deft's. brief, p. 40.)

That grounds exist which would justify the courts in denying refunds of constitutionally imposed taxes to others than the purchaser who has in fact borne the tax burden, the taxes being upon the sale, and the truth in this respect can be easily established, as in the case of *United States v. Jefferson Electric Mfg. Co.,* 291 U. S. 386, is no reason for permitting the Collector to proceed with confiscation of petitioner's property if the processing taxes are in fact unconstitutional and void. It is only where the courts have been open to the taxpayer for plain and adequate redress that preliminary relief by courts of equity from unconstitutional exactions has been refused. (*Miller v. Standard Nut Margarine, etc. Co.,* 284 U. S. 498, 59 F. (2d) 79.) If the limitations of remedy provided by the amendments are upheld, then there is no limitation whatsoever to the power of Congress to impose illegal and unconstitutional exactions so long as the per-

son on whom the tax is imposed is capable of shifting the burden to another. Congress is without power to withdraw its consent to be sued where the direct effect is to confiscate property in violation of the Fifth Amendment, nor can Congress by failure to provide remedies amounting to due process reach the same result. Even though the remedy to which petitioner is restricted by the Act as amended should be held due process, the court must still determine whether the remedy is so inadequate, doubtful or cumbersome as to warrant the granting of the relief of equity.

The requirement that the processor prove that he has not directly or indirectly included the amount of the tax in the price is uncertain for the reason that there is no way to determine the application of the provision to a sale where the tax is not added to the sales price as a distinct item. The further burden of proof required of the processor, to show that no part of the tax was "passed on" to the vendee, is even more puzzling and might be regarded as applying to any transaction where the amount of the tax was regarded as a part of the cost of manufacture. Any finding made by the Commissioner on such issue is bound to be entirely conjectual. The question of the proper margin of profit for the processor is undetermined nor is there any criterion for the allocation of profits or losses to the items of tax and manufacturing cost. Any conjecture or opinion which may be reached by the Commissioner would be affected by innumerable economic factors and matters incapable of legal proof, either affirmatively or negatively, and any conclusion must necessarily be based upon entirely arbitrary formulas or rules. The District Court, upon review of the Commissioner's findings, is not presented with an intelligible

basis for the review. Equally impossible of proof is the requirement that the processor show that the tax has not been passed back to the farmer. The requirement that the processor present proof upon matters which are not susceptible of proof or even conjecture and innumerable factors concerning which only the vaguest sort of opinion can be reached, makes it impossible for the taxpayer to obtain redress. A processing tax cannot be earmarked against any particular sale. The fact that all or part of a tax has been or may possibly be passed on creates no equity in the Government. The relations between the processor and his customers may be affected, depending upon the terms of the contract between them, but this furnishes no defense to the Government in an action to restrain the collection of the tax in the first instance. If the injunction is denied on the ground that the refund provision is adequate, then any type of illegal exaction may be enforced against a manufacturer or vendor upon the plea that it has, in fact, been passed on to the public.

Finally, the provision by which the claimant is required to prove that he has not passed on "any part of such amount" apparently precludes recovery of any taxes paid, whether the claim is based on the amount not passed on or on the entire amount. This provision alone is so inadequate on its face and so uncertain in its application as to render the refund remedy inadequate.

Superficially examined, the case of *United States v. Jefferson Electric Mfg. Co., supra,* may appear to support appellee. The decision, however, has no bearing whatsoever on the question of whether the remedy provided by the present act constitutes an adequate remedy at law. The court pointed out that section 424 of the

Revenue Act, which was there in question, *made no changes in the existing system of refunds.* The court said at page 397:

> "It does not purport to commit the decision of claims for refund exclusively to the Commissioner or to give finality to his denials, or to take from aggrieved claimants the right to sue on their claims after denial or inaction by him, or to withdraw from the courts power to entertain such suits." (Quoted in appellee's brief, p. 33.)

The Commissioner under that section was not the fact-finding body and did not create the record in the case, and the taxpayer was permitted to sue *de novo* in the District Court or the Court of Claims upon his claim. Again the Act applied only to refunds on sales taxes. *Indian Motorcycle Co. v. United States,* 283 U. S. 570. The tax being a tax on the sale, the purchaser was the real party in interest unless the manufacturer could prove he had borne the burden of tax, which is one of the items making up the cost of operation. On the other hand, the processing tax is not upon the sale but upon the first act of manufacturing. *Cornell v. Coyne,* 192 U. S. 418. The purchaser is not the real party in interest because the tax does not operate upon the sale to the purchaser.

It is pointed out in appellant Armour & Co.'s brief, pages 21 to 23, that the statute here involved by its terms places a more severe requirement of proof on the claimant, in that the claimant must show that he has not included the tax in the sale price of any article processed

from a commodity, and that he has not passed on any part of the amount to the vendee, or any other person, in any manner; also, that the price paid by the claimant was not reduced by any part of such amount. The amendments to the Act now under consideration also fail to provide the alternative remedy given to the taxpayer which was discussed in the *Jefferson* case, of putting up a bond to reimburse the purchasers, in lieu of proof that the manufacturer had himself borne the burden of the tax. Practical operation of the Act in the present case is altogether different from that of the Act before the court in the *Jefferson* case for the tax here is not upon the identical articles sold but upon the hog from which the articles sold have been converted. The *Jefferson* case holds merely that the provision there discussed amounted to due process under the circumstances of that case, but the presence of due process is not determinative of the right to equitable relief although its absence may require such relief. Likewise, the Act before the court in the *Jefferson* case did not contain the additional restrictions now imposed upon the taxpayer with reference to the time in which the claim must be filed, the necessity of one year's delay in prosecuting the action, and that upon any review of the Commissioner's ruling, the reviewing court be confined to the record as made by the Commissioner.

Until the provisions of the Act have received judicial interpretation by the Supreme Court it is impossible to say what a claimant's rights are. Relief should be granted until all doubt is removed. The Supreme Court in two

recent cases has held that any doubt as to the construction or uncertainty as to the operation of a refund statute warrants granting of an injunction against the collection of taxes.

> *Union Pacific R. R. Co. v. Weld County,* 247 U.S. 282;
>
> *Atlantic Coast Line v. Daughton,* 262 U. S. 413.

The amendments in question are entirely novel and constitute a complete departure from existing refund remedies. Obviously, the adequacy of the remedy is seriously impaired, if not entirely destroyed. It follows that even though more than one meaning may be given to the amendments in question, the remedy therein provided is so uncertain that equity should take jurisdiction until the doubt has been removed through a final decision of the Supreme Court.

As clearly and precisely stated in the opinion of Judge Hincks in the *Baltic Mills* case in the District Court of Connecticut, granting a temporary injunction against the collection of processing taxes, discussing the remedy afforded by the Amendment:

> "Moreover, the remedy afforded by the Amendment is cumbersome, involving a multiplicity of issues. To be sure, I should suppose that a claimant under the Amendment would not be precluded in a single proceeding from seeking recovery of taxes accruing in monthly succession. But in order to bring himself within the limitations of the Amendment discussed above he must prove the sale price of 'each article processed from the commodity with respect to which'

> the tax was imposed; and with respect to each such sale he must locate by proof the incidence of the tax. And if the processor in the course of his manufacture co-mingles some of the processed material with other non-taxable material, after a sale of the articles thus manufactured, he will be confronted with further complications in proving the incidence of the tax. In this connection, it must be observed that in U. S. v. Jefferson Electric Co., 291 U. S. 386, the taxes involved were excise taxes which by nature differ materially from 'taxes' contemplated by the A. A. A. Moreover in the 'recovery' statute under consideration in that case, Revenue Act of 1928, Sec. 424, express provision was made for the substitution of a bond in lieu of proof that the claimant had himself borne the burden of the tax,—a provision wholly absent from this Amendment."

It is therefore submitted that the requirements of the Act as amended, in connection with the payment of the processing tax, render the said remedy entirely futile.

As pointed out in petitioners' briefs, including that of appellant, Armour & Company, the ~~provision~~ prevention of a full right of review is in itself sufficient to constitute the remedy inadequate; likewise, the uncertainty of the provisions and their doubtful constitutionality are in themselves sufficient to render the remedy inadequate. The uncertainty of the provisions is strikingly illustrated by the refusal of counsel for defendant to assume a definite position with respect to any of the provisions of the amended Act, or on any of the questions raised involving either the construction or validity of the Amendment.

The provision as to the quantum of proof required is so exacting and arbitrary under the circumstances that we feel it merits separate discussion.

VII.

The Fact That Under the Amendments There Is No Accurate Method for Computing Petitioner's Damage, and That the Amount Cannot Be Adequately Proved, in Itself Requires Equitable Relief Against the Exaction of Illegal Levies.

It is asserted in defendant's brief that plaintiff has "a complete remedy at law under the provisions of the act itself. *If it cannot supply the evidence to sustain this allegation it is no better in its equity action than it would be at law,* for as heretofore pointed out if the provision requiring such proof is valid it must be made in equity as well as in law . . ." (p. 40).

The true rule is the exact converse of this statement. It is well settled the fact that there is no certain method for computing the amount of the recovery at law or for adequately proving the amount of damages is in itself, and without regard to any other circumstances, sufficient to give equity jurisdiction and entitles a party to equitable relief.

In the equity action, unlike the law action, it is unnecessary to prove the extent of the loss. It is only necessary to show that there will probably be some loss; the amount is immaterial.

In the law action plaintiff cannot recover the difference between the amount of the processing tax which it cannot prove it did not pass on and the amount of such processing tax which it actually did not pass on. It is this latter amount which plaintiff is entitled to recover under any view of the amendments. As shown in the petition, it cannot recover this latter amount—which it is entitled to recover both in law and in equity—even though it shall equal the full amount of the tax, due to the absence of

any certain method, under the circumstances, for computing the amount not passed on or for adequately proving such amount.

As stated in 32 *Corpus Juris,* pp. 62, 63, Sec. 40:

> "An action for damages is an inadequate remedy where there is no method by which the amount of the damage can be *accurately computed,* or where the amount cannot be *adequately proved.*" (Italics ours throughout.)

In *Texas Co. v. Central Fuel Oil Co.* (C. C. A. 8), 194 Fed. 1, 11, 12, an order dismissing the bill was reversed with directions to grant a preliminary injunction to prevent violation of a monthly installment contract to deliver crude oil. The court said:

> "The damages in this case are impossible of proof. No one can say what amount of oil the Central Company will or can produce during the life of the contract by a conscientious attempt to comply with it. It is a well-known fact, of which courts are bound to take judicial notice, that oil is fugacious, and may be drawn away by strangers through other wells. The flow of the wells decreases in the course of years, and long before the expiration of this contract these wells may become entirely dry. Any damages awarded would be wholly speculative and uncertain, and without any possibility of sufficient legal proof to sustain the judgment."

And the the question of multiplicity of actions:

> "If, as suggested, successive actions for the damages suffered may be instituted upon the expiration of certain fixed periods, when the amount of oil taken from the wells during the preceding period

has been ascertained, there would necessarily have to be a multiplicity of suits, to avoid which the intervention of a court of equity is certainly proper."

Texas Co. v. Central Fuel Oil Co. (C. C. A. 8), 194 Fed. 1, 11, 12.

The case was followed in *Marquette Cement Mining Co. v. Oglesby Coal Co.* (D. C. Ill.), 253 Fed. 107, 117, where the court said:

"Equity jurisdiction was sustained, because plaintiff *could not recover all the damages it might sustain, and because they were impossible of proof*, the amount of oil which the defendant could produce being uncertain. So in this present case no one can tell what damage the cement company may sustain by future subsidence. Future actions at law would be necessary as the injury progressed. Recurring suits for damages would be more vexatious and expensive than effective."

Marquette etc. Co. v. Oglesby Coal Co. (D. C. Ill.), 253 Fed. 107, 117.

In *Angier v. Webber,* 14 Allen 211, 92 Am. Dec. 748, 750, in a decision by Justice Bigelow, the court said:

"For this violation of their covenant the plaintiff is entitled to relief in equity. An action at law will furnish no adequate remedy. The damages are in their nature such as not to *be susceptible of proof or exact computation;* and the injury caused by the acts of the defendants is a constantly recurring one, for which multiplied suits at law would afford but an imperfect remedy."

Angier v. Webber, 14 Allen 211, 92 Am. Dec. 748, 750.

Columbia College of Music, etc. v. Tunberg (Wash.), 116 Pac. 280, 282:

> "To prevent wrong is the peculiar province of equity. His conduct has been such, and promises to be of such character, that damages may result. If so, they would be irreparable, in the sense that they could be *estimated only by conjecture* and not by any accurate standard."
>
> *Columbia College of Music, etc. v. Tunberg* (Wash.), 116 Pac. 280, 282.

In *Crouch v. Central Labor Council* (Ore.), 293 Pac. 729, 732, the court said:

> "There is no standard by which the amount of that damage can be measured with reasonable accuracy. Irreparable damage does not have reference to the amount of damage caused, but rather to the difficulty, not to say impossibility, of measuring the amount of damages inflicted."
>
> *Crouch v. Central Labor Council* (Ore.), 293 Pac. 729, 732.

Chas. C. Wilson & Son v. Harrisburg (Me.), 77 Atl. 787, 791:

> "Where the extent of a prospective injury is uncertain or doubtful, so that it is impossible to ascertain the measure of just reparation, the injury is irreparable in a legal sense, so that an injunction will be granted to prevent such an injury."
>
> *Chas. C. Wilson & Son v. Harrisburg* (Me.), 77 Atl. 787, 791.

In *Pitts v. Carothers* (Miss.), 120 So. 830, 831-832, the court, quoting a contention of appellant similar to that here made by defendant, said:

> "He says: 'If damages are so remote and so speculative that they cannot be determined or ascertained with any degree of accuracy, then, under our law, there is no damage, and if no damage, no injury, and if no injury, certainly there was no right for the granting of a mandatory injunction.' *Unwittingly appellant has furnished one of the definitions of irreparable injury under the rules of equity in reference to injunctions.* An injury is irreparable when it cannot adequately be compensated in damages or where there exists *no certain pecuniary standard* for the measurement of the damages. Where the *extent of the prospective injury is uncertain or doubtful* so that it is impossible to ascertain the measure of just reparation, the injury is irreparable in a legal sense, so that an injunction will be granted to prevent such an injury. To render an injury irreparable it is not necessary that the pecuniary damage be shown to be great, but, on the contrary, the fact that in an action at law the jury could award only nominal damages often furnishes the very best reason for interference by a court of equity by injunction."
>
> *Pitts v. Carothers* (Miss.), 120 So. 830, 831-832.

Gilchrist v. Van Dyke (Vt.), 21 Atl. 1099, 1100:

> "To estimate with substantial accuracy the amount of water furnished by each of the springs, respectively, will be very difficult. The uncertainty of the supply will tend to render the contracts of the orators to supply others uncertain. The extent of the in-

> juries to the orators, and the consequences resulting therefrom, will be difficult of estimation. In wet weather the orators may not be injured in the least. To ascertain the just measure of damage from the threatened acts of the defendant, if carried out, will be well-nigh impossible. Such an injury, in a legal sense, is irreparable; and a writ of injunction is not only permissible, but is the most appropriate and only adequate remedy."

Gilchrist v. Van Dyke (Vt.), 21 Atl. 1099, 1100.

The showing made in the petition herein and in the record before this court, from which it appears that there is not only no method or standard of computing the petitioner's damage but their is no possibility of proving the amount of recovery under the Act as amended, has not been controverted in this case otherwise than by the unsupported assertions in defendant's brief that if plaintiff is "able to determine that it is conducting its business at a loss then it is submitted that plaintiff is also able to determine the amount of the tax that is passed on" (p. 35) and the statement that if the petitioner is in a position to inform the court that it lost money, then it certainly can determine the amount of money which it lost by reason of its inability to pass on the tax (p. 38).

Counsel's argument is that if petitioner is able to determine that there has been a loss, it obviously is able to determine the amount of the loss. Obviously, this does not follow; nor would it follow, as counsel for defendant seems to imply, that even if plaintiff could establish the

amount of its loss in any month, it could from such amount determine the amount of its loss by reason of the processing tax. Defendant has never at any time suggested and counsel have not been informed of any method whatsoever by which petitioner may prove, as he is required to do under the Act as amended, the sales price of each "article processed from the commodity with respect to which" the tax was imposed and with respect to each such sale established by proof the incidence of the tax. Such proof, as appears from the petition herein, is entirely unavailable.

At several places in defendant's brief the statement is made, without supporting argument or authority, that it is incumbent on petitioner to show affirmatively in this present proceeding *"the complete status of its business"*, including other than "hog products", even though such products are in no way affected by the tax nor can any facts with reference to such products be considered pertinent to any inquiry involved in this suit (p. 39).

If an answer to this contention is necessary, it is found in the case of

Oliphant v. Richman (N. J.), 59 Atl. 241, 242,

where the court said:

> "Irreparable damage does not mean that the complainant must show that *all his financial transactions* will be ruined unless the relief sought is granted. It means that, *with reference to the particular right or property referred to in the bill* of complaint, the complainant will be irreparably deprived of it unless the relief sought is granted."
>
> *Oliphant v. Richman* (N. J.), 59 Atl. 241, 242.

VIII.

The Practical Operation of the Amended Act Will Result in a Multiplicity of Suits or at Any Rate a Multiplicity of Causes Which Will Constitute That Needless, Vexatious and Interminable Litigation From Which It Is in the Power of Equity to Grant Relief.

The very origin of equitable jurisdiction was intended to supplant definite and limited legal remedies and for that very reason some of the precepts of equity cannot and should not be bound by the form but rather by the scope of the application. As we have previously pointed out, it is possible in this case to confine the action to a single complaint and summons and in such complaint set forth separately the causes appertaining to each taxable period. It can be readily seen, however, that this in itself could not avoid the concept of multiplicity. Multiplicity would still exist as the taxpayer, petitioner herein, would have to offer the type of proof required under the amendments as to each and every taxable period not only under the terms of the Act as to any matter occurring after the adoption of the Act but for and to all taxable periods ever since the inception of the Act applicable to hog processors, to November 5, 1933. We believe that it has been summarily stated that more than a thousand suits at the present time are pending throughout the United States in Federal courts. It can readily be realized what effect upon the rights of a litigant this mass of litigation requiring separate proof of each and every taxable period of one

month each since November, 1933, and as to each sale and purchase and each process of manufacture will have upon the adequacy of the relief obtainable in all actions. Likewise as to each taxable period and the transactions thereunder, proof will have to be submitted to the Commissioner of Internal Revenue and his adjudication awaited by the taxpayer before the taxpayer can proceed in an action at law. It is interesting to note that under the Act, the transcript of the Commissioner being a legal prerequisite to the trial of the action, what may happen to the rights of the taxpayer in the event that the Commissioner, through pressure of business, is unable to determine the status. The taxpayer, not only in the institution and prosecution of a suit, but so far as the preparation of the review is concerned, is apparently left to the mercy of any delay in the Commissioner's office.

Under the Act, the Commissioner of Internal Revenue is the ~~right~~ trial tribunal for the determination of the rights of the taxpayer as far as refunds are concerned. The District Courts act only as courts of review, for under the Act they must consider the transcript adduced before the Commissioner of Internal Revenue has the record of the case. Until the Commission has set the matter for hearing and hearing had thereon and a record completed and certified thereof, the taxpayer cannot proceed to have any court review the Commissioner's findings. That the question of multiplicity cannot be narrowly construed is best illustrated by the case to which the appellee has directed us, *Hale v. Allison,* 188 U. S. 56, and we repeat at this time the excerpt thereof:

"Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided *upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied;* these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will *practically* prevent a multiplicity of litigation and will be an *actual convenience* to all parties, and will not unreasonably overlook or obstruct the material interests of any."

The amendments to which we have reference above to the Act, of course, were not in effect on August 15, 1935 at the time the court considered the *Fisher Flouring Mills* cases and in fact in the *Fisher Flouring Mills* cases the court carefully directs the attention of all parties to the fact that it ~~cannot~~ expressly refuses to consider the proposed legislation for the mere reason that it had not been enacted.

It is readily seen that an application for refund remedy provided by the Act as amended will result in exactly the same situation as that before the court in *Hill v. Wallace,* 259 U. S. 54, for the reason that the same detail of proof will be required as of each individual transaction.

Obviously, the question of multiplicity is not determined by the mere number of suits permitted or required but rather by the substantial difficulty of the litigation entailed. There may be decisions in which the necessity of monthly suits or presentations of claims has been held not necessarily to result in a multiplicity of suits in the equity sense but we have not been cited to such decisions. In petitioner's brief two cases have been cited where monthly suits have been required under circumstances involving much less hardship than the refund remedy under discussion and such litigation has been held to amount to multiplicity of actions in the equity sense.

> *Postal Cable Telegraph Co. v. Cumberland T. and T. Co.,* 177 Fed. 726;
>
> *Minnetonka Oil Co. v. Cleveland Vitrified Brick Co.,* 111 Pac. 326.

To the same effect is the case of

> *Texas Co. v. Central Fuel Oil Co.,* 194 Fed. 1, *supra.*

Certainly, if the practical necessity of monthly suits is ever to be regarded as constituting a multiplicity of actions, the present case on this ground alone is a situation where equity will relieve from the hardship of unnecessary and interminable litigation.

IX.

Plaintiff Is Properly in a Court of Equity. It Has Done Equity Throughout and Has in Every Manner Safeguarded the Rights of the Defendant. Defendant Can Suffer No Harm by Reason of the Granting of the Relief Prayed for Pending Appeal.

Plaintiff is properly in a court of equity. Its right to relief has been sustained after thorough consideration both of argument and of presentation of briefs and independent consideration by all of the judges of the district in which petitioners are located. It has resorted to relief speedily after holding by courts of high resort that similar legislation was invalid. In addition thereto, pending determination of suits until the vacating of the temporary injunction, it has impounded funds sufficient to pay the tax due and accruing taxes, together with any penalties that might appertain thereto. This protection of the rights of the defendant has been either in the form of the deposit of cash with the clerk of the court or by giving surety bond with good and adequate surety. No harm can be suffered by the defendant by reason of the relief prayed for pending appeal.

The processing tax applies solely to hogs handled by petitioners. It does not apply to any other product, but defendant's assertion that profits and losses of other parts of its business should be considered in granting relief, serves to indicate the complexity of the situation and that equity must intervene to afford a substantial remedy to the litigants.

X.

Defendant's Contention That Plaintiff Has Been Guilty of Laches Is Entirely Without Basis In the Record. No Facts Are Present Showing What Defendant Has Done to Conserve Funds Collected or to Be Collected In View of the Apparent Illegality of the Act.

Defendant devotes a portion of his argument to asserting that the plaintiffs herein have been guilty of laches. It is difficult to understand in what manner such fault can be attached to the plaintiffs. The plaintiffs have paid their taxes so long as no grave doubt was shown as to the validity of the law under which the taxes were levied, assessed, and collected. The defendants here are not in a position to assert that the plaintiffs had no right to assume that a law enacted by Congress was a valid exercise of legislative power as granted to it by the Constitution. It was not until after the decision in the *Schechter* case that grave doubt became apparent as to the validity of the Act. The plaintiffs were not advised of or given notice in any manner or charged with any notice of any act where the position of the defendants was in anywise changed. It can not be successfully maintained that plaintiffs are obligated to pay taxes unless there is a valid, statutory enactment for the assessment levied and the collection of a tax. Unless a tax can

be collected from the plaintiffs under a valid enactment, no right exists on the part of the defendants to collect any money. This point was considered in the case of *Gebelein, Inc. v. Milbourne,* in which judgment was given for the plaintiff in the District Court in Maryland in a case involving the question of processing taxes. In the *Gebelein* case the taxpayer showed financial impoverishment through the operation of the tax. Likewise, there the defendant collector urged laches as a defense and the court, in speaking of the situation there particularly prevailing, says:

> "It would seem rather that the taxpayer is entitled to credit for its effort to co-operate with the Government in paying the tax so long as it was financially possible for it to do so."

It is but fair to state to the court now that the question of laches, though not set forth as a ground by the defendants in the original motion to dismiss, was nevertheless urged at the time the motions were heard upon the respective judges of the District Court and fully presented before the denial by said judges of the motion to dismiss.

XI.

Answer to Miscellaneous Contentions of Defendant.

It is asserted in defendant's brief, at pages 14 to 21, that hardship is not a ground for enjoining the payment of tax. However, the case presented here is not one of hardship merely but of illegal exaction on the part of the Government leading to irreparable injury and presenting a situation universally recognized as affording equitable relief.

It is suggested, on pages 19 and 20 of defendant's brief, that by making a deposit in court, or offering to put up a bond, the plaintiff refutes the allegations with reference to hardship. Obviously, however, it is only by this method that plaintiff can ever prosecute an action and obtain a determination that the taxes were illegally assessed. Even if such a determination could be obtained otherwise, it would not be beneficial as a practical matter due to the withdrawal by the recent legislation of all reasonable redress.

The defendant in several instances in his brief, particularly on page 14, draws the unwarranted conclusion that the processing tax has been passed on to the public. The allegation contained in each of the complaints is to the effect that plaintiff's business, ever since the inception of the tax, has been and is now carried on at a loss. If pe-

titioner is carrying on business at a loss, it certainly has not passed on the tax. The additional element presented, however, is that the amount of the loss does not establish that any part of the tax has been passed on to plaintiff's vendees. The element of profit on inventories by reason of advancing markets has reduced the loss occasioned by the fact that the tax is being absorbed and not passed on, but petitioner has demonstrated in its petition for relief here that this element is not susceptible of computation.

Defendant further, on page 24 of his brief, claims that prior hereto an action could have been commenced on the law side and determined as to whether or not the tax exaction is legal and whether petitioner should recover the taxes paid. Pendency of the *Hoosaic* case even at this time is sufficient answer to that. The Collector certainly would not abide by a decision of a lower court in a single case. The determination whether on the law side or the equity side would have to be a final determination. All petitioners are praying in effect, and what they received at the hands of the district courts in the first place, is injunctive relief during the pendency of such final adjudication. We believe defendant's argument best illustrates that equity should interfere to hold the status of the parties in abeyance until final adjudication.

Defendant also asserts with apparent confidence, on pages 42 and 43 of his brief, that the present application is from an order denying an injunction pending appeal in

the District Court, and that that court's exercise of its discretion should not rightly be overruled. As pointed out herein, it is obvious from an examination of the only order made by the court in connection with this matter, by which petitioner was directed to apply to this court, as is now being done, the situation presented is not one of the exercise of discretion by the trial court and a review thereof upon its denial of the application, but rather, its refusal to exercise such discretion and express direction to present the matter to this court.

There are other miscellaneous suggestions occurring in defendant's brief which are equally unwarranted, but which lack of time prevents us from discussing. We request, and trust, that the court will not treat our failure to refer to such suggestions in this brief as a concession of their validity.

Conclusion.

No sufficient reason has been presented in defendant's brief for denying plaintiff the relief sought by this petition. On the contrary, the various arguments and assumptions of defendant illustrate that even the amended remedies may be of doubtful validity and are certainly of doubtful meaning and application. All of these matters will have to be dealt with in the presentation of authority in support of the appeal itself. This, together with the

expressed intent appearing upon the face of the amendment, of the framers thereof, that remedies and claims should await the final adjudication of the validity or invalidity of the Act, make this a particularly appropriate case for the exercise of the equitable power of the court, and we therefore request that the rights of the litigants be held in abeyance until such final adjudication or sooner determination of this appeal.

All of which is respectfully submitted,

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In the United States
Circuit Court of Appeals
For the Ninth Circuit.

THE LUER PACKING COMPANY, a corporation, Plaintiff and Appellant, vs. NAT ROGAN, etc., Defendant and Respondent.	No.
MERCHANTS PACKING COMPANY, a corporation, Plaintiff and Appellant, vs. NAT ROGAN, etc., et al., Defendants and Respondents.	No.
UNION PACKING COMPANY, a corporation, Plaintiff and Appellant, vs. E. M. COHEE, etc., et al., Defendants and Respondents.	No.
STANDARD PACKING COMPANY, a corporation, Plaintiff and Appellant, vs. NAT ROGAN, etc., et al., Defendants and Respondents.	No.
MAX GOLDRING, doing business under the firm name and style of GOLDRING PACKING COMPANY, Plaintiff and Appellant, vs. NAT ROGAN, etc., et al., Defendants and Respondents.	No.
UNITED DRESSED BEEF COMPANY, a corporation, Plaintiff and Appellant, vs. NAT ROGAN, etc., et al., Defendants and Respondents.	No.
CORNELIUS BROTHERS, LTD., a corporation, Plaintiff and Appellant, vs. NAT ROGAN, etc., Defendant and Respondent.	No.
ARMOUR & COMPANY, a corporation, Plaintiff and Appellant, vs. NAT ROGAN, etc., Defendant and Respondent.	No.

Affidavit in Support of Appellants' Petition for Supersedeas and Preliminary Injunction.

(Continued on Inside Cover.)

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STATE OF CALIFORNIA)
CITY AND COUNTY OF) ss.
SAN FRANCISCO)

Ralph V. Hunt, being first duly sworn deposes and says:

That he is a citizen of the United States and the State of California, over the age of 21 years, to wit, of the age of 38 years; that he is and has been for more than six years last past a Certified Public Accountant duly licensed and admitted to practice as such in the State of California; that for more than nine years last past affiant has been employed by and connected with the national firm of Certified Public Accountants known and designated as the firm of Ernst and Ernst; that said firm of Ernst and Ernst, among many other employments and engagements, is the official auditor and accounting consultant of the Metropolitan Water District of Southern California (a project involving the expenditure of a sum in excess of $200,000,000.00); that as an employee of said firm of Certified Public Accountants affiant is in direct charge and supervision of such auditing and consultation of and with said Metropolitan Water District of Southern California; that as a part of affiant's said duties in supervising said auditing and said accounting consultation work it is necessary that affiant be thoroughly familiar with and affiant avers that he is thoroughly familiar with and understands the varied and intricate cost accounting procedures and allocations of all departments and divisions of said gigantic project.

That in addition to said duties of affiant involved in his said firm's said engagement with said Metropolitan Water District of Southern California, and in many and other professional engagements of his said firm, including the auditing and accounting consultations with meat packing

concerns, affiant specializes in installation of accounting systems and consultation relative to accounting procedure and cost accounting problems. That based upon affiant's said certificate as a certified public accountant, his experience, training and practice, affiant is thoroughly familiar with all phases of accounting and cost accounting procedure in all lines of business, including that of the meat packing industry.

That included among the professional engagements of said firm of Ernst and Ernst are auditing and accounting consultation engagements with meat packing concerns within the State of California and throughout the several states of the Union.

That affiant has examined that certain act commonly known as the Agricultural Adjustment Act, and particularly Section 21 thereof, as amended. That affiant's interpretation of said section of said Act as amended, and particularly paragraph (d) thereof, which interpretation affiant is advised by counsel is fair and reasonable, is as follows, to wit: Under paragraph (d) of said Section 21, the appellants herein will be precluded from securing refunds of any taxes heretofore or hereafter paid by them, even though such taxes are unconstitutional or invalid, unless the appellants establish that they have not, either directly or indirectly, included the amount of such tax in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner; that when paid by appellants, said taxes become part of the cost to them of the product which they ultimately sell to their customers; that in the processing of hogs by appellants said hogs are divided into

numerous and separate portions and products, including hams, sausage, bacons, lard, loins, hocks, feet, heads, shoulders, trimmings, casings, neck bones, tails, and many other portions; that some of said products are pickled and others are smoked and yet others of which go through sundry other processes, and some are sold as fresh meat.

That after the slaughter of said hogs portions of the carcass of said hog are usually converted into sausage by the use of pork trimmings and, in the instance of a shortage of trimmings, by the use of other portions of varying values of such carcass, to wit, such as shoulders; that it is usual and customary for the meat packer to manufacture sausage made wholly from pork products and also to manufacture sausage made proportionately from pork products and other meat ingredients; that in the manufacture of sausage which is made only from a portion of pork products it is necessary for the packer to and he does utilize other meat products which are wholly free from tax as imposed under said Agricultural Adjustment Act; that the packer from time to time varies, to an extent, the formulae of mixed pork products as depending upon the availability of the meat ingredients.

That for the foregoing reasons and further reasons hereinafter averred and set forth, it would be and is, from an accounting standpoint, impossible to allocate the proportional part of said processing tax so levied on the live weight of the hog before processing to each of said portions and products thereof after processing; and it is impossible, from an accounting standpoint, to earmark and follow the different products of each hog after processing or to show and establish the cost of each of said various products therefrom or the sale price thereof, for the reason that said various portions of many hogs so processed

are of necessity in the meat packing industry co-mingled and stored together until the sale of some portion of such co-mingled products is available and, therefore, different products aforesaid are necessarily marketed at different times and under different marketing conditions and at greatly varied prices, and because of all of which it is factually impossible to determine the sale price of the products of any one dressed hog as a whole.

Affiant further avers that appellants sell the products processed from hogs on the open market and in competition with other processors over the State of California, as well as in competition with other processors, who ship into and sell in said state like pork products; that in the sale of such products so processed by said packers the same are also sold on the open market and in competition with other meat products and substitutes which are wholly tax free under the terms of said Agricultural Adjustment Act; that affiant is informed and believes and therefore avers that in the sale of such products the appellants have not and do not add or include the processing tax as a separate item on their invoices; that as a practical accounting matter appellants would be precluded from doing so by their inability accurately to allocate any particular part or portion of the said tax to any particular product or quantity thereof, and that in this connection affiant is informed and believes and upon such information and belief avers that should appellants, or any of them, so attempt to allocate any particular part of said tax and do so inaccurately or make misstatements in that regard appellants' so doing would be subject to the heavy penalties imposed by Section 20 of said Act as amended.

Affiant is informed and believes and upon such information and belief alleges that due to economic and com-

petitive conditions prevailing from time to time in the markets in which appellants buy hogs and sell the products therefrom, and due to the perishable character of appellants' products, by reason of which they are upon occasion forced to make immediate and disadvantageous sales, they sometimes sell their said products at a loss and sometimes at a profit and will necessarily continue to do so; that said Section 21 (d) does not provide whether the price received by the appellants upon the sale of one of their products is to be allocated first, to the full reimbursement of the processing tax payable by appellants, or first to the full reimbursement to appellants of their costs other than said taxes, or prorated to all of appellants' costs.

That because of the foregoing and all other averments in this affidavit contained affiant avers that from an accounting standpoint it would be absolutely impossible to establish in the case of any particular portion or quantity of said pork products whether the tax with respect thereto was or was not passed on by appellants to their customers, and in particular as a matter of accounting it would be impossible to establish that any definite and ascertainable part of such tax was or was not so passed on; that in this connection affiant avers that the assumption that a particular pork product, or any specified quantity thereof bears any particular part of the tax is wholly arbitrary and is not susceptible of proof by any system of accounting.

Affiant is informed by counsel and believes and therefore avers that in order to recover any processing taxes, if hereafter paid by appellants, appellants will be required to show under the said Section 21 (d) of said Act, as amended, that the price paid by them for the hogs processed by them was not reduced by the amount of such processing tax; appellants in the past have paid and neces-

sarily will pay for their purchases the competitive open market prices in effect at the time of each purchase; the market price of such commodity is, has been and will continue to be a fluctuating price depending upon market conditions in respect of supply, demand, cost of production, freight rates, competition and other factors prevailing from time to time.

Affiant avers that the processing tax payable by appellants with respect to any hogs which they buy is only one of many factors affecting the market price of such commodity at any given time; the effect of such single processing tax factor upon the market price of hogs as an accounting matter can at no time be isolated and determined and it is therefore affiant's opinion that it is not possible for the appellants to show, in respect of any purchase, whether, or to what extent, the market price thereof was affected by said tax.

Affiant further avers that it is his opinion, based upon his said certificate as a Certified Public Accountant and his qualifications and experience as herein averred and set forth, that the fact of such passing on of said tax to the vendee or passing back of said tax to the vendor, as an accounting matter, is impossible to determine and that any attempt to so determine the same would result in speculation and conjecture.

Further affiant saith not.

Ralph V. Hunt

Subscribed and sworn to before me this 23rd day of September, 1935.

Mary F. Redding

Notary Public in and for the City and County of San Francisco, State of California.

zal

7918 7935

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

THE LUER PACKING COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., Defendant and Respondent. No.

MERCHANTS PACKING COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., et al., Defendants and Respondents. No.

UNION PACKING COMPANY, a corporation, Plaintiff and Appellant,
vs.
E. M. COHEE, etc., et al., Defendants and Respondents. No.

STANDARD PACKING COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., et al., Defendants and Respondents. No.

MAX GOLDRING, doing business under the firm name and style of GOLDRING PACKING COMPANY, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., et al., Defendants and Respondents. No.

UNITED DRESSED BEEF COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., et al., Defendants and Respondents. No.

CORNELIUS BROTHERS, LTD., a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., Defendant and Respondent. No.

ARMOUR & COMPANY, a corporation, Plaintiff and Appellant,
vs.
NAT ROGAN, etc., Defendant and Respondent. No.

Affidavit in Support of Appellants' Petition for Supersedeas and Preliminary Injunction.

(Continued on Inside Cover.)

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In the United States
Circuit Court of Appeals
For the Ninth Circuit.

THE LUER PACKING COMPANY, a corporation, Plaintiff and Appellant, vs. NAT ROGAN, etc., Defendant and Respondent.	No.
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Affidavit in Support of Appellants' Petition for Supersedeas and Preliminary Injunction.

STATE OF CALIFORNIA)
CITY AND COUNTY OF) ss.
SAN FRANCISCO)

GEORGE KERR, being first duly sworn deposes and says:

That he is the office manager of the Los Angeles plant of ARMOUR & COMPANY, a New Jersey corporation now operating a pork packing plant in the city of Los Angeles, state of California, under lease from Hauser Packing Company. That he has been connected with the pork packing industry for a period of twenty years last past and during said twenty year period he has become familiar with the accounting methods used in pork packing plants and particularly by Armour & Company. That during said period he has also become acquainted with the manner and method of processing hogs.

That subsequent to the purchase of a hog by the processor, and just before slaughtering, the hog is weighed in order to establish the processing tax liability of the processor under the Agricultural Adjustment Act. After the hog is slaughtered the carcass is processed into more than fifty separate and distinct products and by-products, including those listed on page 12 of the petition filed herein by Armour & Company.

Affiant further states that the price paid for hogs on the hoof is a fluctuating price, varying from hour to hour as well as from day to day. Furthermore, it is usual that the ultimate character of some of the products may be changed prior to their final completion, such as the conversion of trimmings and some times cuts, into sausage,

and in the manufacture of such sausage other ingredients in varying proportions are often added.

That after the hog has been processed into various products and by-products and said products have been processed to the extent that the processor finds necessary or advisable, such products are sold in an open and competitive market, usually covering a period of 10 days to 6 months after the slaughter, and the price received therefor depends upon the market price on the day on which said products are sold, and such products are sold not only in competition with other pork products but with other meat products of many different kinds and with other food products and meat substitutes, all of which products have a varying degree of perishability, which materially affects the price on any given date. Hence, the sales price received for such products may have no actual relation to the cost thereof to the processor.

No accounting system of the packing industry with which affiant is familiar is so established that it is now possible to prove as to taxes which became due and payable before the Act was amended that such taxes were not passed on to the public, for the reason that no system of identification of the particular articles processed from any particular hog carcass has been established or can be established. Consequently, all articles which were processed from hogs killed before the effective date of the amendments are now intermingled and confused and that such products can not be traced back to the carcass from which processed; hence, it can not be proven that any such individual article was sold for more or less than its in-

dividual cost as a part of the carcass from which it was taken. That there is not now in existence any operating procedure or accounting system used by the pork packing business of which affiant is aware by which such allocation of the finished product to the carcass of the hog from which it was taken could be made.

Further, in affiant's opinion, it would be impossible to establish an operating procedure that would identify each and every product processed from a given hog carcass to the end that same might be accounted for subsequently at the time of sale of each and every one of those products.

Further affiant saith not.

George Kerr

Subscribed and sworn to before me this 23rd day of September, 1935.

Mary F Redding

Notary Public in and for the State and City and County aforesaid.

My Commission expires July 1

(Seal)

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

MERCHANTS PACKING COMPANY, a corporation, Appellant, vs. NAT ROGAN, etc., et al., Appellees,	No. 7978
MAX GOLDRING, doing business under the firm name and style of GOLDRING PACKING COMPANY, Appellant, vs. NAT ROGAN, etc., et al., Appellees,	No. 7979
UNITED DRESSED BEEF COMPANY, a corporation, Appellant, vs. NAT ROGAN, etc., et al., Appellees,	No. 7980
STANDARD PACKING COMPANY, a corporation, Appellant, vs. NAT ROGAN, etc., et al., Appellees,	No. 7981
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ARMOUR & COMPANY, a corporation, Appellant, vs. NAT ROGAN, etc., Appellee,	No. 7984
CORNELIUS BROTHERS, LTD., a corporation, Appellant, vs. NAT ROGAN, etc., Appellee.	No. 7985

BRIEF OF APPELLANTS ON APPEAL FROM ORDERS DISSOLVING INJUNCTIONS.

(Continued on Inside Cover.)

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Circuit Court of Appeals
For the Ninth Circuit.

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CORNELIUS BROTHERS, LTD., a corporation, Appellant, vs. NAT ROGAN, etc., Appellee.	No. 7985

BRIEF OF APPELLANTS ON APPEAL FROM ORDERS DISSOLVING INJUNCTIONS.

STATEMENT OF THE CASE.

Appellants in the above-entitled causes have appealed to this Honorable Court from orders made by Honorable Paul J. McCormick, judge of the United States District Court for the Southern District of California, vacating temporary injunctions theretofore granted appellants in said causes, by the terms of which appellees were enjoined from collecting or attempting to collect processing taxes levied against appellants under an Act of Congress commonly known as the Agricultural Adjustment Act.

The orders appealed from in the case of each appellant herein are identical [Luer Rec. pp. 86, 90].

Plaintiffs are engaged in the meat packing business in Los Angeles county and were and are processors of hogs as defined by the Act. In the carrying on of their business, they engaged and are yet engaging in only intrastate business; and to no degree, either directly or indirectly, has their business of meat packing and processing of hogs at any time affected or interfered with or burdened interstate commerce.

The above actions were filed separately, and after the filing of the complaint in each case a restraining order was issued. After separate hearings and arguments in each case temporary injunctions were thereafter issued in each case by the judge before whom the case was pending in the District Court. Appellees motion to dissolve the injunction in each case was made before the Honorable Paul J. McCormick, one of the judges of the District Court. The motions were identical in each case, and were heard together and the court made separate orders identical in terms in each case, vacating the tem-

porary injunctions theretofore granted. Supplemental complaints were filed by each of the appellants and thereafter an appeal was perfected by appellants to this court upon separate records in each case. A petition was made by each appellant before this court for an order granting injunction or supersedeas pending appeal, which petitions were heard together and the prayers thereof granted by this court in a joint order. There is also a separate assignment of errors filed by each appellant, which assignments present substantially identical questions.

For the convenience of court and counsel, and since the matters involved in the above-entitled causes are similar, the above-named appellants are filing this joint brief as the brief of each of said appellants.

For convenience, we are sometimes referring hereinafter to the parties hereto as plaintiff and defendant, respectively, and by the term plaintiff shall mean all of the above-named appellants.

As indicated, the records in each case in the various appeals are substantially identical and it has not been deemed necessary to burden this brief with citations to the pages of the individual records, which, of course, are indexed according to documents which may be readily found by consulting the index.

The complaints are substantially similar and seek to have the court declare the Agricultural Adjustment Act unconstitutional and unenforceable and to grant an injunction against the defendant Collector of Internal Revenue for the Sixth District of California, restraining the collection of processing taxes under the terms

of the Agricultural Adjustment Act. It was alleged that the act under which the taxes were levied was unconstitutional for the reasons, among others, that the Act was violative of Article I, Section 8 of the Constitution; of the Tenth Amendment thereto; of the Fifth Amendment thereto; and of Article I, Section 8, Clause 3 of the Constitution; and as further reasons for injunctive relief, that appellants had and were given no plain, adequate, speedy and complete remedy at law; that a multiplicity of actions would ensue for the recovery of such illegal taxes paid, if they paid the same and they undertook to obtain a refund thereof; that the Act sought to regulate intrastate business and commerce; that they were engaged only in intrastate business; that they were unable to pass such tax on to the vendee or ultimate consumer, and would continue to be unable to do so; that to deny injunctive relief to them as prayed would result in irreparable loss and injury to them, resulting in the loss of their property and the good will of their said business; and that the penalties provided, both civil and criminal, in the event appellants refuse to pay the processing taxes, were in nature and effect so excessive, harsh and oppressive as to amount to a complete denial of a remedy and to cause irreparable injury to appellants. As a further reason for the granting of such injunctive relief, it was also alleged therein that there was then pending in the Congress of the United States certain proposed amendments to the Agricultural Adjustment Act which would have the effect of entirely preventing and defeating any legal

remedy appellants might otherwise have for the recovery of any taxes paid, in the event the Agricultural Adjustment Act should be declared unconstitutional.

A hog processor is unable to comply with the onerous conditions of the amendments to the Agricultural Adjustment Act because the facts required to be proved are incapable of ascertainment and the right of refund therein provided is purely illusory and does not constitute any remedy at law or any remedy whatsoever. [Tr. Armour & Co. v. Rogan, pp. 21-22.] None of the averments of the bills of complaint, of the supplemental bills, of the petitions or affidavits filed have ever been denied by the defendants either by answer herein, affidavit, or otherwise, because of which all of the allegations thereof have been, at all times since the filing thereof, in effect, admitted as true and are yet so admitted as being true.

By the terms of the temporary injunctions plaintiffs were required to furnish bond in specified amounts or to deposit cash with the clerk of the court in lieu thereof, securing the defendant for the amount of taxes, penalties and interest due, if it should be finally determined that such injunctions were improperly issued, which security was duly furnished, or cash in lieu thereof deposited with the clerk of the court.

The temporary injunctions granted in each case, with one or two exceptions, are identical in terms, except as to amounts and formal recitals, containing the following language:

> ". . . and after hearing counsel for the respective parties, and the matters having been submitted

to the court for its consideration; and it appearing to the court, and the court finds that it is true, that certain processing taxes are due and payable from plaintiff under the terms of the Agricultural Adjustment Act, hereinafter more particularly described, and processing taxes will monthly in the future become due and payable from plaintiff under the terms of such Act; that there is immediate danger of great and irreparable loss and injury being caused to plaintiff if the preliminary restraining order is not issued herein as prayed for in said bill of complaint and petition for the reason that there is immediate danger that said defendant, Nat Rogan, either individually or as Collector of Internal Revenue, will proceed under said Act to collect from said plaintiff said taxes, and in so doing will disstrain, levy upon and sell the property of plaintiff described in said bill of complaint and petition of a large value, thus causing to plaintiff an irreparable loss of such property and the good will of plaintiff's business likewise mentioned in said bill of complaint and petition; and that for each month said plaintiff fails or refuses to pay the processing taxes payable for that month under the Act, plaintiff, together with its officers and agents participating in such violation will be liable every month such violation occurs to the infliction of the great penalties provided by the Act; that plaintiff has no plain, speedy and adequate remedy at law in the premises; that if said restraining order is not so issued there will necessarily result a multiplicity of suits for the recovery of the taxes paid by plaintiff each month under the Act; and that for all these reasons a preliminary restraining order should issue herein against defendant, Nat Rogan, both individually and as said Collector of Internal Revenue, as prayed for in said bill of complaint and petition."

Thereafter, and subsequent to the decision of this court in the case of *Fisher Flouring Mills Co. v. Vierhus,* No. 7938, defendants filed in said District Court their motion to vacate said temporary injunctions. [Luer Rec. p. 83.] The motions were identical in all cases. The grounds of the motion were, in substance, stated as follows:

(1) The court was without jurisdiction to enjoin the collection of the taxes for the reason Section 3224 of the Revised Statutes precluded a suit for that purpose; that the bill of complaint did not state facts warranting such relief; and that complainant had a plain, adequate and complete remedy at law;

(2) That on the records, files and proceedings in the case plaintiff is not entitled to injunctive relief;

(3) That since the preliminary injunctions were granted the alleged grounds upon which the same were granted were no longer in existence for the reason, as stated, that the Congress, in its enacted amendments to the Act, did not deny the right to litigate the legality of processing taxes in actions at law, such as was contained in the bill as originally passed by the House of Representatives and the basis upon which the injunctions were herein granted. (Note: Judge James, in his minute order granting temporary injunction in the Luer case [Luer Rec. p. 75] in effect excluded from consideration this matter [see last lines, p. 76 of Rec.]. And the other judges, in their orders granting the temporary injunctions, did not base their decisions upon this ground);

(4) That appellants were guilty of laches for the reason they paid the taxes for many months prior to the filing of their suits, etc.; and

(5) That since the preliminary injunctions were entered herein the Circuit Court of Appeals for the Ninth Circuit has denied an injunction pending appeal in cases based on similar causes of action to that set out in appellants' bills of complaint, and that such decision of the said Circuit Court is binding on this District Court, so that it is improper for this court to allow said temporary injunctions to remain in force and effect.

The judges of the District Court who granted the respective temporary injunctions in these cases, being absent on vacation, the said motions to vacate the injunctions were noticed before and were heard by Judge McCormick of that court. The motions were granted by him on August 30, 1935. The sole ground for the action of the court on this behalf is stated in the order of the court in this language:

> "An event which should be considered has occurred since the interlocutory injunctions were granted: The Ninth Circuit Court of Appeals, in *Fisher Flouring Mills Co. v. Collector, etc.,* decided August 15, 1935, by a divided opinion, in applications for temporary injunctions in aid of pending appeals in the court from the denial of injunctions by a District Court in the state of Washington in suits like the one at bar, denied the respective appellants such restraint pending appeal.
>
> "No principle of judicial administration is more firmly established in the United States than that lower courts must submit to the control of superior judicial tribunals. Notwithstanding the strong dissent by one of the circuit judges in the Court of Appeals, it is our plain duty to follow the majority opinion.

> "Both opinions indicate that the appellate court was establishing a rule intended to control all applications for temporary injunctions in equity suits brought in this circuit where the suitors seek to restrain the collection of processing taxes under the Agricultural Adjustment Act, and *such authoritative control requires the granting of the motion* to vacate the preliminary injunction heretofore issued in this suit, and it is so ordered." (Italics ours.)

By order of the District Court leave was granted plaintiffs to file herein supplements to their respective bills of complaint, and thereafter petitions for rehearing were heard and denied.

The supplemental bills of complaint were filed in each action, which set forth in great detail the particulars on which the remedies provided by the amendment to the Agricultural Adjustment Act were inadequate and facts showing that the conditions imposed by the amendments were so burdensome that it would be impossible for plaintiff to comply therewith. The petition of plaintiffs for an appeal to this court from the order vacating the temporary injunctions was allowed. The appeals have been perfected in each case, and are now pending herein.

Thereafter appellants filed in this court petitions for supersedeas and injunctions pending appeal and on September 24, 1935, after oral argument, this court granted the petition and issued a supersedeas and injunction pending appeal. In that connection, the order of this court required that these appellants either furnish security to said Collector by way of corporate surety to be approved by said District Court, or deposit cash with the clerk of that court equal to all taxes, penalties and interest

due and to become due from appellants to said Collector under the terms of said Agricultural Adjustment Act and the Act as amended, and for which no security, or cash deposit, has heretofore been given or made by appellants under order of court herein; and said appellants respectively have fully carried out the said order, in that they have filed with the clerk of said District Court and had approved by such court undertakings of a surety corporation securing to said Collector the payment of all taxes, penalties and interest due from appellants to date.

The assignments of errors of appellants upon which appellants rely in this appeal are, in substance, as follows:

Specifications of Errors Relied Upon by Appellants.

1. The District Court erred in granting the motion vacating the temporary injunction.

2. The District Court erred in vacating the temporary injunction for the reason that its order was made inadvertently under the mistaken belief that the decision of this court theretofore rendered in the *Fisher Flouring Mills* cases required the court to make such order.

3. The District Court erred in vacating said temporary injunction for the reason that such order will have the effect of preventing appellant from obtaining a trial of the cause on its merits, and will cause irreparable damage and loss to appellant, whereas the continuing

in force of said temporary injunction under its terms will not harm appellee.

4. The court erred in vacating said temporary injunction for the reason that the issues presented by this case are such as to require, for the proper disposition of the case, a hearing by the court, and decision of the issues of fact upon which appellant's right to relief is based.

5. The court erred in dissolving said temporary injunction because the circumstances and conditions which were set forth in plaintiff's complaint, and not contradicted by the record in said cause, and which allegations were found by the court to be true, and which necessitated the granting of the temporary injunction, continued in existence at the time of the said order dissolving the said injunction.

6. The court erred in dissolving said temporary injunction because since the passage by Congress of the amendments to the Act, which occurred subsequent to the decision of the Circuit Court of Appeals in the said case of *Fisher Flouring Mills Company, a corporation, vs. Alex McK. Vierhus, etc.,* any remedy at law that plaintiff has heretofore possessed has been rendered so cumbersome, capricious, uncertain, unwieldy, and impossible of proof as to deprive the plaintiff of any and all remedy at law.

7. The court erred in dissolving said temporary injunction because the order dissolving the temporary

injunction heretofore granted to the plaintiff herein will, in effect, result in taking the property of the plaintiff without due process of law, in that, after taking the property of the plaintiff in satisfaction of the taxes assessed and levied under said Agricultural Adjustment Act, as amended, the remedies provided to the plaintiff, and which plaintiff would be compelled to pursue, where injunctive relief is denied to it, are so cumbersome, costly and limited and uncertain as to amount to a denial of any relief to it.

8. The court erred in vacating said temporary injunction for the reason that unless said temporary injunction is permitted to remain in force, appellant will be required to engage in a multiplicity of suits from which equity should afford relief.

9. The court erred in vacating said temporary injunction for the reason that there was no showing that the maintenance of said action was prohibited by the provisions of Section 3224 of the Revised Statutes.

10. The court erred in vacating said temporary injunction for the reason that there was no showing that plaintiff was guilty of laches in the institution of said action.

Appellants rely upon each and every of their respective assignments of error, as each assignment is germane to the issues set out in the specifications of error here relied upon.

BRIEF OF THE ARGUMENT.

I.

If the Trial Court Inadvertently Made the Orders Appealed From Under a Mistaken Belief That the Decision of This Court Theretofore Rendered in the Fisher Flouring Mills Cases Required the Granting of Such Order, Then Upon Suggestion to This Court of the Fact of Such Inadvertence and Mistake the Orders Should Be Reversed.

The temporary injunction was vacated by the trial court, not upon any showing of any change in the circumstances, but solely upon the ground that the decision of this court in *Fisher Flouring Mills Co. v. Vierhus,* rendered August 15, 1935, required the trial court to refrain from exercising its independent judgment and to vacate the injunction. In this the trial court was in error, for the reason that the *Fisher Flouring Mills* case was based upon different facts and was decided under the law as it stood prior to August 24, 1935, at which time a claim for refund was not subject to the restrictions and limitations of the amendments to the Act of that date.

II.

The Temporary Injunction Having Been Granted After a Full Hearing and Upon a Showing of Circumstances Found to Justify Granting Equitable Relief to Plaintiff, Which Facts Have Not Been Controverted by Defendant in Any Manner, and Defendant Not Having Shown Any Change in Circumstances or Conditions Necessitating the Vacating of Said Temporary Injunction, the Court Was Not Justified in Granting Defendant's Motion.

III.

The Continuance in Force of the Injunctions Until the Trial of the Causes on Their Merits Will Not Harm the Appellees, for the Reason They Are, by Deposits of Money and Undertakings Made by Appellants Under Order of Court, Fully Secured in the Payment of the Taxes if Such Taxes Are Finally Declared Valid; Whereas, a Lack of Such Injunction Will Cause Irreparable Damage and Loss to Appellants.

Failure to preserve the *status quo* pending trial would result in irremedial injury to plaintiff, and in view of the fact that the questions presented involve matters of great importance, an injunction should be granted pending the trial of the case.

28 *U. S. C. A.,* Sec. 377;

Foster etc. v. Haydel, 278 U. S. 1, 13, 14, 73 L. Ed. 147, 154;

Cotting v. Kansas City Stock Yards Co. (C. C. Kan.), 82 Fed. 850, 857;

City of Pasadena v. Superior Court, 157 Cal. 781, 790, 795.

IV.

The Temporary Injunctions Should Be Continued in Force Until the Decision on the Merits of the Cases Becomes Final; for Only in and by the Final Disposition of the Cases on Their Merits, Can There Be Determined the Important and Controlling Questions of Law and Fact Upon Which Depend the Right of Appellants to the Relief Prayed For.

The issues presented by this appeal which involve legislation which is of doubtful validity and uncertain construction, and requires the determination of the facts as to the operation of such legislation on plaintiff's business, cannot properly be determined upon a summary hearing, but only after a full trial.

Borden Farm Products Co. v. Baldwin, 293 U. S. 194.

V.

The Temporary Injunction Should Be Continued in Effect for the Reason That Plaintiff Under the Amendments to the Agricultural Adjustment Act Approved August 24, 1935, Has No Plain, Complete, or Adequate Remedy at Law.

A. The Provisions of the Recent Amendments to the Agricultural Adjustment Act Affecting Suits for Refund Limit and Restrict the Remedy at Law in Several Important Particulars.

(1) Claimant must establish to the satisfaction of the Commissioner of Internal Revenue that claimant did not *directly or indirectly* include the amount of the claim in the price of the article or pass on *"any part* of such amount to the vendee or to any other person in *any manner"* or include *"any part* of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by *any part* of such amount." Sec. 21(d) (1).

Southern Pac. Co. v. Darnell Taenzen Lmbr. Co., 245 U. S. 541, 62 L. Ed. 451, 455;

International Harvester Co. v. Kentucky, 234 U. S. 216, 222, 223, 58 L. Ed. 1284;

Lash's Products Co. v. United States, 278 U. S. 175, 73 L. Ed. 251.

(a) The fact that under the amendments there is no accurate method for computing plaintiff's damage, and that the amount cannot be adequately proved, in itself requires equitable relief against the exaction of illegal levies.

32 *C. J.*, p. 62, Sec. 40;

Texas Company v. Central Fuel Oil Co. (C. C. A. 8), 194 Fed. 1;

Marquette Cement Mining Co. v. Oglesby Coal Co., 253 Fed. 107, 117.

(b) A court of equity is not deprived of jurisdiction to grant injunctive relief where the remedy at law is not equally plain, speedy, complete or practical, and as efficient to obtain the ends of justice both in respect to the final relief sought, and the mode of obtaining it, as is the relief in equity.

Cable v. U. S. Life Ins. Co., 191 U. S. 288, 303, 48 L. Ed. 188;

Standard Oil Co. v. Atlantic Coast Line R. Co. (D. C. Ky.), 13 Fed. (2) 633, 635, 636, 637; aff. 275 U. S. 257; 72 L. Ed. 270;

Clark v. Pigeon River Improvement etc. Co. (C. C. A. 8), 52 Fed. (2d) 550, 557;

Munn v. Des Moines Nat. Bank (C. C. A. 8), 18 Fed. (2d) 269, 271;

Atchison, Topeka & Santa Fe R. Co. v. Sullivan (C. C. A. 8), 173 Fed. 456, 470;

Union Pac. Ry. Co. v. Weld County, 247 U. S. 282, 285, 62 L. Ed. 1110, 116;

Magruder v. Belle Fourche Valley Water User's Ass'n (C. C. A. 8), 219 Fed. 72, 79;

Jewett Bros. & Jewett v. Chicago M. & St. P. Ry. Co. (C. C. S. D.), 156 Fed. 160, 167.

(2) "In any judicial proceeding relating to such claim a transcript of the hearing before the commissioner shall be duly certified and filed *as the record* in the case and shall be so considered by the court." Sec. 21(d) (1).

Chicago, B. & Q. R. Co. v. Osborne, 265 U. S. 14, 16, 68 L. Ed. 878.

(3) No suit for refund based on the invalidity of the tax "shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor" is filed by the person entitled thereto. Sec. 21(d) (2).

(4) Such claim must conform "to such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe." Sec. 21(d) (2).

Fredenberg v. Whitney (D. C. Wash.), 240 Fed. 819, 822, 823.

(5) "No such suit or proceeding shall be begun before the expiration of *one year* from the date of filing such claim unless the commissioner renders a decision within that time." Sec. 21(d) (2).

VI.

The Practical Operation of the Amended Act Will Result in a Multiplicity of Suits or at Any Rate a Multiplicity of Causes Which Will Constitute That Needless, Vexatious and Interminable Litigation From Which It Is in the Power of Equity to Grant Relief.

Hale v. Allinson, 188 U. S. 56, 47 L. Ed. 380;

Postal Cable Telegraph Co. v. Cumberland T. and T. Co., 177 Fed. 726;

Minnetonka Oil Co. v. Cleveland Vitrified Brick Co. (Okla.), 111 Pac. 326;

Texas Co. v. Central Fuel Oil Co. (C. C. A. 8), 194 Fed. 1.

VII.

Section 3224 of the Revised Statutes Does Not Bar Relief and Did Not Require That the Existing Injunction Be Dissolved.

Miller v. Standard Nut Margarine Co., 284 U. S. 498, 76 L. Ed. 422;

Skagit County v. Northern Pac. Ry. Co., 61 Fed. (2) 638 (C. C. A. 9);

Hopkins v. Southern Cal. Telephone Co., 275 U. S. 393, 72 L. Ed. 329;

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 37, 39, 52 L. Ed. 90;

Wallace v. Hines, 253 U. S. 66, 67, 64 L. Ed. 782;

Union Pacific Railroad Co. v. Weld County, 247 U. S. 282, 286, 62 L. Ed. 1110;

Atlantic Coast Line Ry. v. Daughton, 262 U. S. 413, 67 L. Ed. 1051;

Wilson v. Illinois Southern Railroad Co., 263 U. S. 574, 576, 68 L. Ed. 456;

Hill v. Wallace, 259 U. S. 462, 66 L. Ed. 822.

VIII.

Section 21(a) of the Amended Act Does Not Bar Relief and Did Not Require That the Existing Injunction Be Dissolved.

(1) Section 21(a) was not made a ground of defendant's motion to vacate the temporary injunction and was not referred to therein.

Alaska Salmon Co. v. Territory of Alaska (C. C. A. 9), 236 Fed. 62, 63;

Van Norden v. Chas. R. McCormick Lumber Co. (C. C. A. 9), 17 Fed. (2) 568;

Hercules Powder Co. v. Rich (C. C. A. 8), 3 Fed. (2) 12.

(2) The provisions of Section 21(a) do not by their terms purport to apply to taxes imposed before the date of the adoption of the amendment.

(3) Section 21(a) should not be construed, even as to future taxes, as an absolute bar to equitable relief.

(a) Section 21(a) should be construed as a reenactment of Section 3224 of the Revised Statutes.

Heald v. District of Columbia, 254 U. S. 20, 65 L. Ed. 106;

Lattimer v. U. S., 223 U. S. 501, 56 L. Ed. 526.

(b) Section 21(a) is not to be extended beyond its express terms and is to be construed in favor of the plaintiff.

Hecht v. Malley, 265 U. S. 144, 68 L. Ed. 949;

Gould v. Gould, 245 U. S. 151, 153, 62 L. Ed. 211.

(c) Section 21(a) constituting a part of a legislative enactment which was presumably considered an adequate legal remedy, is not applicable where the legal remedy turns out to be inadequate.

(d) Section 21(a), in the absence of specific language to the contrary, will not bar a suit where the legal remedy is inadequate.

Miller v. Standard Nut Margarine Co., 284 U. S. 498, 76 L. Ed. 422.

(e) The terms of Section 21(a), which do not purport to take away jurisdiction from the courts in the light of congressional debate thereon, indicate that there was no intent to impair equity jurisdiction.

Fox v. Standard Oil Co., 294 U. S. 87, 79 L. Ed. Adv. Sh. 339.

(f) Section 21(a), being applicable by its terms both to state and federal courts, should not be construed as an absolute prohibition of injunctive relief.

(g) Section 21(a) must be construed in the same manner as Section 3224, and subject to the same exceptions, and applied only where the legal remedy is adequate, otherwise the Fifth Amendment is violated.

Graham & Foster v. Goodcell, 282 U. S. 409, 75 L. Ed. 415;

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107;

Lipke v. Leiderer, 259 U. S. 557, 559, 562, 66 L. Ed. 1061, 1064;

Phillips v. Commissioner, 283 U. S. 589, 596, 75 L. Ed. 1289;

Regal Drug Corp. v. Wardell, 260 U. S. 386, 391, 67 L. Ed. 318;

Ettor v. Tacoma, 228 U. S. 148, 57 L. Ed. 773;

Gold Medal Foods, Inc., v. Landy (D. C. Minn.), decided October 22, 1935;

A. P. W. Paper Company, Inc., v. Riley (D. C. N. Y.), decided October 18, 1935;

Panama Railroad Co. v. Johnson, 264 U. S. 375, 390, 68 L. Ed. 748, 754.

IX.

There Was No Showing That Plaintiffs Were Barred by Laches.

ARGUMENT.

I.

If the Trial Court Inadvertently Made the Orders Appealed From Under a Mistaken Belief That the Decision of This Court Theretofore Rendered in the Fisher Flouring Mills Cases Required the Granting of Such Order, Then Upon Suggestion to This Court of the Fact of Such Inadvertence and Mistake the Orders Should Be Reversed.

In approaching the discussion under this heading we are not unmindful of the general rule that on an appeal it is the judgment or order of the trial court, as the case may be, which the appellate court reviews and not the opinion or reason given by the trial court for such judgment or order. Here, however, the court's order shows that the court declined to exercise its discretion.

It is to be remembered that by paragraph V of the motion to vacate the injunctions the ground thereunder relied upon for the dissolution of the injunctions was that since this court in the *Fisher Flouring Mills* cases had denied an injunction in cases based on similar causes of action to that of the instant cases, it was improper for the trial court to allow the temporary injunctions to remain in force.

Whether the statements contained in the orders are findings or reasons, they are so inextricably woven into the orders that the validity of these orders cannot be discussed or considered without likewise discussing and considering these statements given for having made the orders.

The language of the orders vacating the injunctions very clearly exposes the foundational circumstances upon which the trial court based its orders.

> "An event which should be considered has occurred since the interlocutory injunctions were granted: The Ninth Circuit Court of Appeals, in *Fisher Flouring Mills Co. v. Collector,* etc., decided August 15, 1935, by a divided opinion, in applications for temporary injunctions in aid of pending appeals in that court from the denial of injunctions by a District Court in the State of Washington in suits like the one at bar, denied the respective appellants such restraint pending appeal.
>
> "No principle of judicial administration is more firmly established in the United States than that lower courts must submit to the control of superior judicial tribunals. Notwithstanding the strong dissent by one of the Circuit Judges in the Court of Appeals, it is our plain duty to follow the majority opinion.
>
> "Both opinions indicate that the appellate court was establishing a rule intended to control all applications for temporary injunctions in equity suits brought in this circuit where the suitors seek to restrain the collection of processing taxes under the Agricultural Adjustment Act, and *such authoritative control requires the granting of the motion* to vacate the preliminary injunction heretofore issued in this suit, and it is so ordered." (Italics ours.)

That the trial court was under the definite impression that the decision in *Fisher Flouring Mills v. Vierhus* precluded it from exercising any discretion in connection with the question of plaintiff's right to injunctive relief in this case, is also clearly indicated by the order which it made

upon allowance of the appeal in this matter, in which it was directed that any application for injunctive relief be presented to the Ninth Circuit Court of Appeals. The portion of this order to which we refer was set out in the opinion heretofore rendered, and is as follows:

> "That, *in view of the action had and taken by the United States Circuit Court of Appeals for the Ninth Circuit* in the matter of petitions submitted to it for injunction pending appeal in matters involving processing taxes under the Act of Congress popularly known as Agricultural Adjustment Act, it is the expression of this court that any relief in the form of supersedeas, whereby the temporary injunction heretofore granted and dissolved by the order appealed from, be restored to full force and effect during the pendency of the appeal, should be pursued by the plaintiff in the form of an application for an injunction pending appeal to be presented to said United States Circuit Court of Appeals for the Ninth Circuit if the plaintiff wishes to secure such relief." [Armour & Co., Tr. pp. 96-97.] (Italics ours.)

It is, therefore, submitted that the second specification of error, to-wit:

> "2. The District Court erred in vacating the temporary injunction for the reason that its order was made inadvertently under the mistaken belief that the decision of this court theretofore rendered in the Fisher Flouring Mills cases required the court to make such order."

is well taken.

The refusal of the trial court to exercise its judicial discretion cannot be more clearly shown in any case than by the court's own statement of the grounds for its order.

The trial court definitely and succinctly defined the only matters considered by it in passing on the motion of appellees for the orders made; and beyond doubt, the court would not have dissolved the injunctions but for its erroneous conception of the mandatory nature of the decision of this court in the *Fisher Flouring Mills* cases. That the trial court was laboring under a misapprehension and because thereof inadvertently made the orders vacating the injunctions, is likewise beyond doubt.

This court in its opinion herein has expressly held that the facts involved in the two groups of cases were dissimilar. To quote:

> "In those cases the trial court had denied an injunction and an application was made to this court for such an injunction pending the appeal. The situation is changed by amendment to the law affecting the remedy of a taxpayer to recover an invalid tax. The facts alleged also are different from those involved in the Fisher Flouring Mills cases."]

The decision of this court in the *Fisher Flouring Mills* cases did not become controlling, and should not, to any degree, have controlled, in the matter of the dissolution of the temporary injunctions in the instant cases.

The court did not make its orders dissolving the injunctions on all grounds generally, nor on the grounds mentioned in the motion other than the fifth ground. The temporary injunctions had originally been granted by the same court, but by different judges of that court, upon a showing of facts deemed amply sufficient to warrant the order granting them. Between the time of the issuance of such injunctions and the hearing on the motions to vacate them, there were no changes in the facts and circum-

stances of the cases noted by the trial court excepting the *Fisher* decision. Then how can any other grounds be reasonably ascribed for the orders than the one ground stated in the order itself?

The trial court thus having been led into error through a misconstruction of the opinion of this court in the *Fisher Flouring Mills* cases, and having because of that mistake inadvertently vacated the injunctions herein, the appeals should prevail.

It is clear that in the present case the court definitely refused to exercise any discretion in passing upon the issues presented by the motion. *No clearer showing could ever be made in any case, as to such refusal.*

Even if it could be said that the court had in fact exercised its discretion in the matter, it has been held by this court that a ruling vacating an injunction is not binding on appeal in the same sense as an order granting or denying a temporary injunction. The latter is regarded as discretionary to some extent; but upon a review of an order dissolving an injunction the appellate court is required to indulge the presumption that the original order granting the temporary injunction is valid and proper, and that that in itself furnishes a *prima facie* case for the continuance of the *status quo* pending the trial.

In the case of *Bathwell v. Fitzgerald, et al.,* 219 Fed. 408 (C. C. A. 9), this court said:

> "This brings us to the consideration of the only question involved in this appeal: Was the lower court right in dissolving the interlocutory injunction? The rule that the granting or refusing of a preliminary injunction ordinarily rests in the sound discre-

> tion of the trial court, and the review thereof by an appellate court is limited to the inquiry whether there was an abuse of discretion in granting the writ, is based largely upon the consideration that the object and purpose of the preliminary injunction is to preserve the existing state of things until the right of the parties can be fairly and fully investigated and determined upon strictly legal proofs according to the course and principles of equity. . . But no such consideration obtains where the trial court dissolves a preliminary injunction. *The granting of an injunction to preserve the status quo may be a substantial and persuasive reason for continuing it in force.* It follows that when a preliminary injunction has been dissolved, the appellate court will not be limited to the question whether the trial court has abused its discretion in dissolving the injunction, *but may inquire into all of the circumstances connected with the proceedings as they appear of record, and the effect the dissolution of the injunction may have on the rights of the parties.*"

The reasons for this rule are peculiarly applicable to the present case where the trial courts, after full hearing and extended arguments, have determined that the temporary injunction is proper and have entered their orders providing for the preservation of the *status quo* pending the trial and safeguarding the rights of all parties; and defendant did not, upon the motion to dissolve such temporary injunction, make any showing whatsoever or attempt to make any showing of any change of circumstances other than to call the trial court's attention to the decision of this court in the *Fisher Flouring Mills Company* case.

II.

The Temporary Injunction Having Been Granted After a Full Hearing and Upon a Showing of Circumstances Found to Justify Granting Equitable Relief to Plaintiff, Which Facts Have Not Been Controverted by Defendant in Any Manner, and Defendant Not Having Shown Any Change in Circumstances or Conditions Necessitating the Vacating of Said Temporary Injunction, the Court Was Not Justified in Granting Defendant's Motion.

The showing made by plaintiff in its complaint, supplemental complaint, petition for injunction pending appeal and in the affidavits filed herein, of the circumstances entitling plaintiff to equitable relief have not been controverted in any manner by the defendant, and stand admitted in the record in this case. The trial court found that the circumstances set forth entitled plaintiff to the relief prayed for. In the order of Judge James in the *Luer Packing Co.* case, it was stated that

> ". . . there is grave doubt as to the constitutionality of the Act. . . . The court also concludes that the facts alleged show unusual and exceptional conditions warranting the issuance of an injunction, exclusive of any consideration of the fact that Congressional action is threatened which may deprive plaintiff of any right of action at law, as to which allegation of fact it is believed the court can give small weight because of its speculative and conjectural character."

This minute order was adopted in the opinion of the other judges granting the motion for temporary injunction. No appeal has been taken by the Government from the order denying the motion to dismiss, and defendants from time to time have obtained extensions of time to plead to the bills of complaint.

The motion to vacate was not accompanied by any affidavits or any showing of any change of circumstances, or any showing of fact whatsoever.

III.

The Continuance in Force of the Injunctions Until the Trial of the Causes on Their Merits Will Not Harm the Appellees, for the Reason They Are, by Deposits of Money and Undertakings Made by Appellants Under Order of Court, Fully Secured in the Payment of the Taxes if Such Taxes Are Finally Declared Valid; Whereas, a Lack of Such Injunction Will Cause Irreparable Damage and Loss to Appellants.

In its order granting the temporary injunctions the trial court in each case, made an order providing for the giving by plaintiff of an approved surety bond or in lieu thereof deposits of sums of money with the clerk of the United States District Court in amounts sufficient to secure the collector the payment of the processing taxes owing by the plaintiff under the terms of the Agricultural Adjustment Act, together with penalties, interest and costs, in the event it should be finally decided that the injunction was improperly issued or the action should be dismissed. Each of the appellants has deposited with the clerk of the court the respective sums of money required or has furnished a corporate surety bond approved by the court in the required amounts.

Upon granting the *supersedeas* and injunctions on appeal herein, this court required that appellants each should cause to be executed and filed in said District Court a bond of a corporate surety approved by said court in an amount equal to the unpaid amount of taxes, penalties and interest then due and for which security had not theretofore been given, and for the taxes, penalties, and interest each month thereafter becoming due under the Agricultural Adjustment Act; and appellants respectively have executed and filed with said clerk a duly

approved undertaking as required by the order, and will as and when further processing taxes become due from them under the terms of the Act furnish in a like manner the security required.

Thus, it will be observed that, if it should finally be determined that the Agricultural Adjustment Act and the Act as amended are constitutional and enforcible, the appellees will not be damaged in anywise by a continuance in force of the temporary injunctions until that event transpires. The possession of the money is deferred, but one may afford the withholding of money for a limited length of time if one receives 1% per month interest, to say nothing of an additional 5% of the principal added for the withholding. On the other hand, if the injunctions are not continued the appellants are faced with certain and irreparable loss. They may choose to pay the processing taxes at a ruinous loss to their business as alleged in their bills of complaint, without hope of securing a refund thereof if the tax be ultimately declared invalid, as herein more fully discussed; or they may refuse to pay the taxes now assessed and as they are from month to month assessed, and suffer the consequences of such non-payment. This consequence might be (1) distraint and sale of all the property and good will of appellants to the utter loss of all thereof to appellants, and (2) suffering by the officers and agents of the appellants the unusually severe and harsh penalties.

It must appear to this Court that the continuance of the injunctions in force will be of no real detriment to the appellee Collector, but will be of inestimable benefit to the appellants. This is not a case wherein appellants are seeking to avoid a tax for revenue purposes exacted under a statute already adjudicated to be, or which beyond

a doubt is, constitutional, like the income tax act at the present time, for example. It is questionable whether the Act and the amendments thereto are revenue measures at all, and whether the Act and the amendment are constitutional and enforcible. The law is a new departure in taxation based on novel and unprecedented lines, the experience under which according to the allegations of the bills of complaint herein has brought about a situation of exceptional and unusual hardship to the appellants by reason of their prior compliance with the law and will result in extraordinary loss and irreparable damage unless the enforcement of the law is enjoined until the merits of the cases may be tried and determined, or until the Supreme Court of the United States declares itself upon the important questions involved.

The equities of these appellants are in no wise diminished because the United States Government happens to be interested in the litigation. Equity delights in equality. Furthermore, as we have pointed out the appellants are doing equity by giving, and offering to continue to give, complete security for the ultimate payment to the Collector of the processing taxes, if finally held to be valid. The appellants will continue to furnish to the Collector ample security for the payment of said processing taxes, becoming due from month to month, and the interest and all costs assessed against them, if it be finally decided by judicial decree that the taxes are valid and enforcible. The rights of the appellees being thus safeguarded in all respects, it must be admitted that no harm can be suffered by them by reason of an order of this court preserving the *status quo* of these cases pending final determination of the questions involved.

The questions now presented to this court are not now upon final hearing, but are presented at a stage in the pro-

ceedings where temporary relief alone is sought. The merits of the cases cannot be considered or determined at this time, nor in this proceeding. In the meantime, however, the appellants and their property rights should be protected by this court through injunctive relief according to the rules and practice of equity, such relief being made imperative by the circumstances and exigencies affecting appellants' cases.

Judge Lindley in the case of *Kingan & Company v. Smith, Collector* (D. C. Ind.), in an opinion denying a motion to dismiss the bill of complaint, said:

> "Unfortunately there can be no authoritative determination of the constitutional questions involved until the Supreme Court shall have made its adjudication thereof. * * * the final decision lies with the Supreme Court. It is hardly consistent with equity to permit, during the interim awaiting final adjudication, collection of taxes, attacked for illegality without assurance of a remedy for reimbursement. Rather it seems that the court should protect both the sovereign government, and the subject by preservation of the existing status until final adjudication.
>
> "I have made it a condition to the temporary injunction issued that all taxes accruing from time to time shall be paid into court by the taxpayer and deposited subject to the order of the court. If it later be determined that the tax is proper, the government will receive all the same without deduction, expense or delay, and without any impediment to its administrative functions. Thus, it seems to me, equity is done both parties with injury to neither."

A denial by this court of this appeal from the order vacating the temporary injunction would have the effect

of precluding any further prosecution of this cause. The collector will proceed to enforce payment of the tax involved, so that the action will become moot. It will be impossible for plaintiff to obtain in this or any other proceeding a decision on the merits of the questions presented by the complaint.

In *Foster, etc. v. Haydel,* 278 U. S. 1, 13, 14, 73 L. Ed. 147, 154, the trial court refused to grant a temporary injunction in an action by a packing company to enjoin the enforcement of a state statute which forbade the shipment of raw shrimp out of the state of Louisiana for the purpose of canning. The Supreme Court reversed the decree, saying:

> "If the facts are substantially as claimed by plaintiffs, the practical operation and effect of the provisions complained of will be directly to obstruct and burden interstate commerce. (Citing cases.) The affidavits give substantial and persuasive support to the facts alleged. And as, pending the trial and determination of the case, plaintiffs will suffer great and irremedial loss if the challenged provisions shall be enforced, their right to have a temporary injunction is plain. From the record it quite clearly appears that the lower court's refusal was an improvident exercise of judicial discretion."

In *Cotting v. Kansas City Stock Yards Co.* (C. C. Kan.), 82 Fed. 850, 857, the opinion was by Justice Thayer. A suit to enjoin the enforcement of a state statute fixing minimum charges was dismissed but an injunction pending appeal was allowed, the court saying:

> "The great importance of the questions involved in these cases will doubtless occasion an appeal to

the supreme court of the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stock-yards company would sustain a great and irreparable loss. Under such circumstances, as was said in substance, by the Supreme Court in Hovey v. McDonald, 109 U. S. 150, 161, 3 Sup. Ct. 136, it is the right and duty of the trial court to maintain, if possible, the *status quo* pending an appeal, if the questions at issue are involved in doubt; and equity rule 93 was enacted in recognition of that right. The court is of opinion that the cases at bar are of such moment, and the questions at issue *so balanced with doubt as to justify and require* an exercise of the power in question." (Italics ours unless otherwise noted.)

As stated in *City of Pasadena v. Superior Court,* 157 Cal. 781, 790, 795:

"In *Polini v. Gray,* L. R. 12 Chan. Div., 438, it is said by the master of the rolls: 'It appears to me on principle that the court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party is to reap the fruit of that litigation and not obtain merely a barren success. That principle, as it appears to me, applies as much to the court of the first instance before the first trial, and to the court of appeals before the second trial, as to the court of last instance before the hearing of the final appeal.'"

IV.

The Temporary Injunctions Should Be Continued in Force Until the Decision on the Merits of the Cases Becomes Final; for Only in and by the Final Disposition of the Cases on Their Merits, Can There Be Determined the Important and Controlling Questions of Law and Fact, upon Which Depend the Right of Appellants to the Relief Prayed For.

As pointed out in the opinion of the court heretofore rendered on the application for injunction pending appeal, the questions involved are important questions of constitutional law and construction of statutes, and the question of fact as to whether in actual operation the statutory remedy is adequate or involves a multiplicity of actions.

The case involves not only the fundamental validity of the tax but the question as to plaintiff's right to resort to injunctive relief, and the construction of novel legislative acts which have not yet been passed upon authoritatively either as to their constitutionality or proper construction. It has been held that such important questions as are here presented should not be decided upon the pleadings, but only after a hearing on the merits.

In *Borden Farm Products Co., Inc. v. Baldwin,* 293 U. S. 194, the Supreme Court reversed the action of the District Court in disposing, upon a motion to dismiss, of

a bill to enjoin the enforcement of the New York Milk Control law. The trial judge had considered the decision of the Supreme Court in *Nebbia v. New York*, 291 U. S. 502, holding certain sections of the act unconstitutional, as conclusive of the question before him, and accordingly dismissed the bill without taking testimony. The case was remanded with instructions to proceed to final hearing and determination of the facts involved. The court in a special concurring opinion by Mr. Justice Stone, and Mr. Justice Cardoza, said:

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."

V. TRIAL

The Temporary Injunction Pending ~~Appeal~~ Should Be Continued in Effect for the Reason That Plaintiff Under the Amendments to the Agricultural Adjustment Act Approved August 24, 1935, Has No Plain, Complete, or Adequate Remedy at Law.

A. The Provisions of the Recent Amendments to the Agricultural Adjustment Act Affecting Suits for Refund Limit and Restrict the Remedy at Law in Several Important Particulars.

(1) *The Requirement That the Claimant Must Establish to the Satisfaction of the Commissioner of Internal Revenue That Claimant Did Not Directly or Indirectly Include the Amount of the Claim in the Price of the Article or Pass on "Any Part of Such Amount to the Vendee or to Any Other Person in Any Manner" in Effect, Deprives Plaintiff of All Remedy at Law.*

This result is not due to any fault of plaintiff, but arises from the fact that there is no criterion for the determination of the indirect incidence of the tax. The factors involved in the determination of this question can only be presented by a month by month showing of the circumstances of each purchase and each sale in the course of plaintiff's business, and when these factors have been established, the question of the extent to which each has influenced the price is necessarily speculative.

As pointed out in the complaint [Armour, Tr. pp. 21, 22] in the supplemental complaints and in the petitions filed herein, plaintiff is unable to sell its finished products at prices sufficiently high to pay the cost of raw material and manufacture together with the amount of the proc-

essing tax. More than 50 separate products result from the processing of a hog, and because of the nature of the business of purchasing and processing hogs and selling the resulting products it is impossible for plaintiff or any one else to ascertain what portion of the processing tax payable upon the processing of the hog is assignable to the products resulting therefrom. The showing made by plaintiff in this regard has not been contraverted in any manner at any stage of these proceedings.

It is impossible to segregate the item of processing taxes and determine to what extent, if any, the sales price of pork products is affected by said tax. The tax is paid on the live weight of the hog. Immediately upon such processing the hog is converted into numerous different articles, each of which is affected by separate and distinct market trends and conditions, and subject to continual fluctuations over periods of time, varying in length with each article, but running from a period of a few days to several months. Upon conversion into such articles the commodity loses its identity. The prices obtained by plaintiff on the sale of the articles or products are determined by competition in the open market with the products of other packers and also with other food products. These prices fluctuate daily and over a wide range. The determination of the extent to which the purchase price obtained by plaintiff might constitute or be properly held to constitute a portion of the processing tax theretofore paid by plaintiff would involve the consideration of factors which it is impossible for plaintiff to establish by proof, even though plaintiff keeps the most accurate and complete records possible.

Prices of hogs are peculiarly sensitive to and reflect instantly supply and demand. When hogs are sent to

market they must be sold, and if a large supply is sent to a particular market on a given day, or during a given period, the price for hogs drops. If the price increases, farmers send more hogs to market—fewer if the price decreases. On the other hand, demand is determined by many factors—by the supply of pork products processors have on hand, by trade requirements which may induce a processor to incur a loss, by the supply of hogs in the country, both present and prospective, by any limitation of the purchasing power of the public which may cause a shift of consumption to substitute foods. Prices obtained for pork products are governed by the same supply and demand factors and by the additional factor that forty per cent (40%) of the hog is sold as fresh pork which is highly perishable and must be disposed of within ten days after processing. Cured pork products must be sold within a limited number of months after processing. It follows that pork products must seek the market level.

Even if the price obtained by plaintiff upon the sale of the articles converted from any particular hog could be determined—and as shown by the plaintiff the same is impossible of ascertainment—the problem would still remain of determining what portion of the sale price so obtained is to be allocated to the reimbursement of the tax to plaintiff, and what portion, if any, to plaintiff's other costs.

Any finding made by the Commissioner on such issue is bound to be entirely conjectural. The question of the proper margin of profit for the processor is undetermined nor is there any criterion for the allocation of profits or losses to the items of tax and manufacturing cost. Any conjecture or opinion which may be reached by the Commissioner would be affected by innumerable

economic factors and matters incapable of legal proof, either affirmatively or negatively, and any conclusion must necessarily be based upon entirely arbitrary formulas or rules. A processing tax cannot be ear-marked against any particular sale. The District Court, upon review of the Commissioner's findings, is not presented with an intelligible basis for the review. Equally impossible of proof is the requirement that the processer show that the tax has not been passed back to the farmer.

The Supreme Court has held, in a case involving the tracing of the effect of a freight charge, with a view to ascertaining who bears the burden of an excessive freight charge, that difficulties of proof under circumstances less complex than those presented here are insuperable. In the case of *Southern Pacific Co. v. Darnell-Taenzen Lumber Co.*, 245 U. S. 531, 62 L. Ed. 451, 455, the suit involved sections of the Interstate Commerce Act providing for recovery of excess freight charges. The court said, in an opinion by Justice Holmes, at page 534:

> "Behind the technical mode of statement is the consideration, well emphasized by the Interstate Commerce Commission, of the *endlessness and futility of the effort to follow every transaction to its ultimate result.* 13 Inters. Com. Rep. 680."

The case of *Burgess v. Transcontinental Freight Bureau,* 13 Int. Comm. Rep. 668, cited in the above case, contains the following statement, at page 680:

> "If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, *it would never be possible to show damages with sufficient accuracy to justify giving them.*"

If the task is endless, futile, or even impossible, to attempt to prove the incidents of the burden of a freight charge, which is the last item of expense incurred in a transaction of sale, it is far more difficult to show or trace the economic burden of an expense such as a processing tax, which is payable at the first stage of processing.

In another analogous case, *International Harvester Co. v. Kentucky*, 234 U. S. 216, 222, 223, 58 L. Ed. 1284, the defendants were indicted for violation of Kentucky statutes which had been construed as prohibiting any combination for the purpose of fixing prices at an amount "greater or less than the real value of the article;" and the real value of the article under Kentucky decisions was held to be the *market value under fair competition and under normal market conditions.* The Supreme Court held that the standard thus laid down was wholly speculative, as it required a determination as to what prices would have been under a wholly imaginary set of circumstances. The court said:

> "The reason is not the general uncertainties of a jury trial, but that *the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind.* The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts."

Plaintiffs in the present case are required by section 21(d) to prove, in respect to processing taxes, elements more clearly speculative than were required to be proved

under the Kentucky decisions. A processor is required to prove that the tax was not passed on. The term itself is so vague and uncertain that it has been said to be entirely misleading and inaccurate. In *Lash's Products Co. v. United States,* 278 U. S. 175, Mr. Justice Holmes said (p. 176):

> "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. . . . The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's burden, but that is all. . . ."

A tax may be said to be passed on only if the prices charged the vendees are increased correspondingly because of the tax. *The question of net profit or loss does not determine the matter,* as a manufacturer may, without increasing his prices, earn the same net income as prior to imposition of the tax, through reduction in costs of operation, or through inventory gains having no relation to the tax. On the other hand, even though all the tax is passed on, items of increased costs, inventory losses or lowered output may result in a loss to the processor. The question of whether the processor has operated at a profit or at a loss will not necessarily indicate whether the tax has been passed on or whether the purchaser has been charged a higher price than he would have been charged except for the tax.

In effect, section 21(d) requires the processor seeking refund to prove what prices would have been paid to the producers and charged to the purchasers if there had been no tax. The claimant is required to evaluate the effect of the tax—which is only one of numerous fac-

tors affecting price—upon the prices paid for hogs and the prices charged for pork products, and to show as of a date many months past these purely fictitious prices with the factor of the processing tax eliminated. It is impossible, as the Supreme Court stated in the *International Harvester Co. v. Kentucky* case, *supra,* to reconstruct prices, leaving out any of the actual factors influencing either the seller or the purchaser at the time of the sale; and the Supreme Court has held that it is impossible to determine the effect of the elimination of a freight charge upon a sale. Market conditions are such that it is impossible to measure the effect of the processing tax upon prices in the packing business.

While section 21(d) is not entirely clear in this respect, it apparently requires that the tax on each hog must be traced and proof made, in the case of each sale of the articles manufactured from the hog, that the price paid for the hog was not reduced by any part of the tax; and also that the prices charged for the products were not increased by any part of the tax, or, if increased, then to what extent. It may be suggested that claimant without making proof as to each hog might by a comparison of average prices, furnish a basis for a rough *estimate* of what part of the amount of the tax was shifted to the farmer in lower prices or to the vendees in high prices. It is impossible to make the proof under this section in either manner. It has been shown that a processor can not keep track of the products from a particular hog. It is equally true that a comparison of average prices prevailing before and after the imposition of the tax is without probative value.

Any probative effect of an influence which might arise from an increase in the price to the vendee or a reduction

to the producer at the time the tax becomes effective, is quickly lost with the lapse of time and the intervention of other factors influencing the price which make it impossible to say that such increased price would not have been charged irrespective of the tax. Because of the fact that prices for pork products are not stable, but fluctuate daily, and vary in different markets on the same day, there is no standard whatsoever for comparing prices after the processing tax went into effect with prices before the tax become effective.

Nor is a comparison of the spread between the processor's cost and his selling price with the spread after the imposition of the tax a matter of any evidentiary importance, for the reason that there is no normal price spread for hog processes and no way of establishing one; and even if such normal spread were fixed and the spread was found to be greater after the imposition of the tax, it would still have to be determined what part of the excess spread was due to the tax and what part to other causes, including abnormal influences such as drought and the Government program of reducing production of hogs. Even if normal conditions prevail at all times, it would be impossible to determine to what extent fluctuation in prices was influenced by the single factor of the processing tax, or to what extent this item can be said to be responsible for any assumed excess spread.

While the operation of the processing tax as a factor in determining prices paid for hogs, as well as prices charged for pork products, is conceded, the *extent* of such operation is a fact which necessarily must rest not in proof, but in mere speculation. A remedy of refund which is based upon the proof of such speculative factors is wholly inadequate and illusory.

The provisions of the Act, as amended, are entirely novel and constitute a *distinct departure* from the long established policy of the Government with regard to recovery of taxes illegally exacted.

This departure from what has heretofore been regarded as an adequate remedy at law for illegally collected taxes is startling in several particulars.

In the case of taxes other than the processing taxes, it is required that a claim for refund shall be first filed with the Commissioner of Internal Revenue, and a waiting period of six months thereafter is required, to allow time for administrative consideration of the claim, the claimant is entitled to, and in fact must, prove his entire claim *de novo,* having only the burden of proving that the Commissioner's tax assessment was erroneous, and that the tax was not in fact due (*Reinecke v. Spalding,* 280 U. S. 227).

The marked dissimilarities of procedure between the remedy provided by the amendments and the provisions governing suits for refund of income, estate and gift taxes illustrate clearly the entire inadequacy of the remedy to which the processer is remitted. In the cases of income, estate and inheritance taxes, the Board of Tax Appeals function *before* payment of the tax is required and taxpayers are not bound to contest the tax before the Board of Tax Appeals, but may elect to pay the tax and pursue their remedies by suits for refunds in the courts; the Board of Tax Appeals is a separate and independent tribunal outside the Treasury Department—the tax determining agency; and the Board sits in review of the determinations of law made by the Commissioner of Internal Revenue and hears and decides the case upon evi-

dence *de novo,* as in suits in the District Courts. *International Banding Machine Co. v. Commissioner,* 37 F. (2d) 660.) The Board, in making the record reviewable by the courts, functions as does a District Court. It receives the case upon pleadings made pursuant to Rules of Practice, and receives evidence in accordance with the rules applicable to suits in equity in the Supreme Court of the District of Columbia. (*Phillips v. Commissioner,* 283 U. S. 589, 595, 596.) The Board issues subpoenas, both to private parties and to the Commissioner of Internal Revenue, supervises the taking of depositions, and in all respects functions as independently of the taxing authorities as do the courts. It is required to make findings of fact and conclusions of law in deciding cases before it, and its opinions are officially reported. (Sections 1211-1230, Title 26, U. S. C. A.)

In contrast, processing-tax payers must make their proofs at such informal hearings as the Commissioner shall see fit to prescribe, and before such of the employees of the Bureau of Internal Revenue as he may designate. Presumably (as indicated in paragraph (e) of section 21), employees of the Commissioner will make so-called field examinations of the accounts and records of the processing-tax payers, and these *ex parte* reports will be part of the record before the court, something never permitted in cases of other taxpayers. The Commissioner, in apparently unlimited administrative discretion, may receive *ex parte* affidavits and deny all rights of cross-examination. It is difficult to conceive of a more incomplete, inadequate, or confused procedure than that

authorized by section 21. The meager powers vested in the courts by the amendments fall far short of providing the judicial determination guaranteed by the Constitution.

Phillips v. Commissioner, 283 U. S. 589, 75 L. Ed. 1289;

Crowell v. Benson, 285 U. S. 22, 76 L. Ed. 598;

Chicago, B. & Q. R. Co. v. Osborne, 265 U. S. 14, 68 L. Ed. 1278.

The constitutional right to jury trial, which exists in tax refund cases (*Garnhart v. United States,* 16 Wall. 162), is denied. A dependent governmental official is constituted both judge and jury, and the record of the cause is made by him.

It may be suggested that the court should assume that the Commissioner will make provisions for proper judicial determination of the questions of fact and law, but it is submitted that rather than subject plaintiff to the risk of irreparable injury through failure of an adequate remedy at law, it is necessary to maintain the injunction until the doubts and difficulties created by the Act have been cleared up and appropriate administrative procedure established.

Entirely aside from constitutional objections and the question of the lack of due process, it is obvious that the remedy to which the processor is confined by the amendments is not sufficiently complete, adequate or available to meet the situation which faces the processor.

In any event, the portion of section 21 as amended which bars plaintiff from recovering processing taxes which it cannot prove have not been passed on to others is without justification.

The Collector may not, in a court of equity, resist a suit brought to enjoin him from illegal seizure of plaintiff's property, upon the ground that plaintiff cannot show that he has not exacted an equal amount from the vendee or some other person.

Under the amended Act plaintiff, under a possible construction, would not be entitled to a refund of any portion of the tax paid if "any part of such amount" has been passed on the vendee, so that plaintiff, in order to clearly establish a claim for refund, would, apparently, be required to show that no consideration whatever was obtained on sale of its products. Despite the fact that plaintiff has not passed the tax to the vendee, and in fact has suffered a loss of several thousand dollars monthly for several months past in the operation of its hog business, it will, nevertheless, be unable to recover back the amount of any tax illegally levied.

The provisions of Section 156 of Title 26 of U. S. C. A., which applied to claims such as plaintiff's prior to the amendment of August 24, 1935, placed no restraint whatsoever as to the amount of illegal tax paid by plaintiff which could be recovered by it nor was there any requirement that plaintiff prove that the tax had not been passed on directly or indirectly to the vendee or to any other person in any manner.

The requirement imposed by the Act in this respect goes far beyond any provision of any previous statute.

In the case of *United States v. Jefferson Electric Manufacturing Co.*, 78 L. Ed. 859, 868, 871, 291 U. S. 386, 394, 402 (relied upon by appellee), the court held that the automobile accessory manufacturers' excise tax refund provision did not constitute a lack of *due process*. No

question of the relative adequacy of legal and equitable remedies was involved. The evidence showed and the trial courts apparently found that the manufacturer had charged a price for his products plus an amount representing the tax. The provision of Section 424 of the Excise Tax Act involved in that case merely required that the claimant establish "that such amount was not collected directly or indirectly from the purchasers." In the present Act the right to a refund is subject to the further requirements in this respect that the tax shall not have been included in the price "of any article processed from the commodity with respect to which it was imposed" and the claimant must show that he has not "passed on any part of such amount to the vendee or to any other person in any manner." He must also show "That the price paid by the claimant * * * was not reduced by any part of such amount." The Excise Tax Act further expressly provided, unlike the Agricultural Adjustment Act as amended, for the substitution of a bond in lieu of proof that the claimant had himself borne the burden of the tax. The tax involved in that case was upon the identical articles sold and not upon some other commodity from which the said articles had been converted. Likewise, the Excise Tax involved was made to take effect upon the very act of sale of the articles and not upon some prior transaction respecting some commodity from which these articles had subsequently been converted. The manufacturer therefore was not beset with the difficulties presented by the processing tax and was in a position to readily show whether the tax arising upon the sale had actually been borne by himself or by the purchaser.

Section 424 of the Revenue Act which was there in question, *made no changes* in the existing system of refunds (p. 397).

The Commissioner under that section was not the fact-finding body and did not create the record in the case, and the taxpayer was permitted to sue *de novo* in the District Court or the Court of Claims upon his claim. Again the Act applied only to refunds on sales taxes. *Indian Motorcycle Co. v. United States,* 283 U. S. 570. The tax being a tax on the sale, the purchaser was the real party in interest unless the manufacturer could prove he had borne the burden of tax, which is one of the items making up the cost of operation. On the other hand, the processing tax is not upon the sale but upon the first act of manufacturing. The purchaser is not the real party in interest because the tax does not operate upon the sale to the purchaser.

In the *Jefferson Electric* case, the specific amount of the tax paid with respect to the article sold was a definite specific amount which was established beyond controversy.

Obviously there was nothing arbitrary in the requirement of that Act that the manufacturer either prove that he had not collected the tax from the purchaser or give a bond to reimburse the purchasers. The case is no authority for the contention that the existence of a right of recovery, even under the provisions of that Act, should stay the hand of equity in enjoining the enforcement of exactions of taxes, the validity of which is questioned. Certainly no case has gone so far as to hold that equity will consider as adequate a remedy at law which is subject to the drastic limitations of the Agricultural Adjustment Act as amended; and any such ruling would be directly contrary to the well established rule of prior decisions that the remedy at law in order to deprive equity of jurisdiction must be adequate, speedy, plain, and complete, and not an impracticable or theoretical remedy which does not reason-

ably and fairly meet the situation or is not as efficient to the ends of justice or to its prompt administration as the remedy in equity.

As set forth in plaintiff's complaint, the original bill amending the Agricultural Adjustment Act as passed by the House of Representatives took away entirely the right of a processor to recover taxes illegally collected. It is evident from a consideration of the operation of the amendment as finally passed that while it does not purport to take away entirely the remedy of the processor, it will in actual operation have that effect. If the Act had gone through as originally proposed it would have been unconstitutional as an attempt to cure an illegal and unauthorized tax by denying all remedy to the taxpayers. (*Graham v. Goodcell,* 282 U. S. 409, 430, 75 L. Ed. 415, 441.) The amendment as passed, is calculated to reach the same result by presenting such substantial and, in fact insuperable, obstacles that the nominal remedy is not actually available or effective.

The fact that all or part of a tax has been or may possibly be passed on creates no equity in the Government. The relations between the processor and his customers may be affected, depending upon the terms of the contract betwen them, but this furnishes no defense to the Government in an action to restrain the collection of the tax in the first instance. If the injunction is denied on the ground that the refund provision is adequate, then any type of illegal exaction may be enforced against a manufacturer or vendor upon the plea that it has, in fact, been passed on to the public.

As stated by Judge Paul, in the case of *Shenandoah Milling Company v. N. B. Early, Jr., etc.* (September 23, 1935); (D. C. Va.):

> "I am not impressed by the argument that the government should not be compelled to pay the taxpayer anything except what he himself can show he had paid. That position is that the government wants to keep money it has illegally collected from some one else because that other person can not show where he got it. The equities of the government are not above the equities of the citizen."

(a) *The Fact That Under the Amendments There Is No Accurate Method for Computing Plaintiffs' Damage, and That the Amount Cannot Be Adequately Proved, in Itself Requires Equitable Relief Against the Exaction of Illegal Levies.*

It was asserted in defendant's brief, heretofore filed, that plaintiff has "a complete remedy at law under the provisions of the Act itself. *If it cannot supply the evidence to sustain this allegation it is no better in its equity action than it would be at law*, for, as heretofore pointed out, if the provision requiring such proof is valid it must be made in equity as well as in law . . ." (p. 40.)

The true rule is the exact converse of this statement. It is well settled the fact that there is no certain method for computing the amount of the recovery at law or for adequately proving the amount of damages is, in itself, and without regard to any other circumstances, sufficient to give equity jurisdiction and entitles a party to equitable relief.

In the equity action, unlike the law action, it is unnecessary to prove the extent of the loss. It is only necessary to show that there will probably be some loss; the amount is immaterial.

In the law action plaintiff cannot recover the difference between the amount of the processing tax which it cannot prove it did not pass on and the amount of such processing tax which it actually did not pass on. As shown in the record, it cannot recover this latter amount—even though it shall equal the full amount of the tax—due to the absence of any certain method, under the circumstances, for computing the amount not passed on or for adequately proving such amount.

As stated in 32 *Corpus Juris,* pp. 62, 63, Sec. 40:

> "An action for damages is an inadequate remedy where there is no method by which the amount of the damage can be *accurately computed,* or where the amount cannot be *adequately proved.*"

In *Texas Co. v. Central Fuel Oil Co.* (C. C. A. 8), 194 Fed. 1, 11, 12, an order dismissing the bill was reversed with directions to grant a preliminary injunction to prevent violation of a monthly installment contract to deliver crude oil. The court said:

> "The damages in this case are impossible of proof. No one can say what amount of oil the Central Company will or can produce during the life of the contract by a conscientious attempt to comply with it. Any damages awarded would be wholly speculative and uncertain, and without any possibility of sufficient legal proof to sustain the judgment."

And on the question of multiplicity of actions:

> "If, as suggested, successive actions for the damages suffered may be instituted upon the expiration of certain fixed periods, when the amount of oil taken from the wells during the preceding period has been ascertained, there would necessarily have to be a multiplicity of suits, to avoid which the intervention of a court of equity is certainly proper."

The case was followed in *Marquette Cement Mining Co. v. Oglesby Coal Co.* (D. C. Ill.), 253 Fed. 107, 117, where the court said:

> "Equity jurisdiction was sustained, because plaintiff *could not recover all the damages it might sustain, and because they were impossible of proof,* the amount of oil which the defendant could produce being uncertain. So in this present case no one can tell what damage the cement company may sustain by future subsidence. Future actions at law would be necessary as the injury progressed. Recurring suits for damages would be more vexatious and expensive than effective."

In *Angier v. Webber,* 14 Allen 211, 92 Am. Dec. 748, 750, in a decision by Justice Bigelow, the court said:

> "The damages are in their nature such as not to *be susceptible of proof or exact computation;* and the injury caused by the acts of the defendants is a constantly recurring one, for which multiplied suits at law would afford but an imperfect remedy."

See, also:

Columbia College of Music etc. v. Tunberg (Wash.), 116 Pac. 280, 282;

Crouch v. Central Labor Council (Ore.), 293 Pac. 729, 732;

Chas. C. Wilson & Son v. Harrisburg (Me.), 77 Atl. 787, 791;

Pitts v. Carothers (Miss.), 120 So. 830, 831-832;

Gilchrist v. Van Dyke (Vt.), 21 Atl. 1099, 1100.

Defendant has never at any time suggested and counsel have not been informed of any method whatsoever by which plaintiff may prove, as it is required to do under the Act as amended, the sales price of each "article processed from the commodity with respect to which" the tax was imposed and with respect to each such sale establish by proof the incidence of the tax. Such proof is entirely unavoidable.

At several places in defendant's brief, heretofore filed herein, the statement is made that it is incumbent on petitioner to show affirmatively in this present proceeding "*the complete status of its business*", including other than "hog products", even though such products are in no way affected by the tax, and the facts with reference to such products cannot be considered pertinent to any inquiry involved in this suit (p. 39).

If an answer to this contention is necessary, it is found in the case of *Oliphant v. Richman* (N. J.), 59 Atl. 241, 242, where the court said:

> "Irreparable damage does not mean that the complainant must show that *all his financial transactions*

will be ruined unless the relief sought is granted. It means that, *with reference to the particular right or property referred to in the bill of complaint,* the complainant will be irreparably deprived of it unless the relief sought is granted."

(2) *The Provision That in Any Judicial Proceeding Relating to the Claim for Refund "a Transcript of the Hearing Before the Commissioner Shall Be Duly Certified and Filed as the Record in the Case and Shall Be So Considered by the Court" (Sec. 21(d), Subdivision (1)), Is Such a Limitation on the Remedy at Law as to Constitute the Same Wholly Inadequate.*

There is no provision for a trial by jury and in fact no provision for any determination of the weight of the evidence, whether by court or by jury. Apparently the court on review of the Commissioner's decision would be bound by any evidence in the record, whether credible or otherwise.

The constitutional questions which arise under the Act as amended are questions which the claimant is entitled to present before a court which is empowered to hear any and all competent evidence, and which is not limited to the review of evidence before some inferior tribunal.

In *Chicago, B. & Q. R. Co. v. Osborne,* 265 U. S. 14, 16, 68 L. Ed. 878, 880, the court held that a provision for a writ of error to the Supreme Court of the state to review the record of a board of equalization is not an adequate remedy. The court said:

"When such a charge as the present is made, it can be tried fully and fairly only by a court that *can*

hear any and all competent evidence, and that is not bound by findings of the implicated board for which there is any evidence, always easily produced."

Apparently, under the Act, the Commissioner is to be the final judge of the facts and no further evidence may be introduced before the court so that the review of the Commissioner's ruling is limited to the question of whether there is any evidence before the Commissioner tending to support his findings. The senatorial debates for Thursday, August 15, 1935, support this construction.

"Senator Borah: The court would have authority to take new evidence?

"Senator Smith: I think the record in the case, as in all tax cases, is made up here.

"Senator Borah: And that record would be conclusive?

"Senator Smith: That record would be conclusive.

"Senator Borah: *That is just the same as denying a man any right to go into court. That really nullifies the Senate provision."*

Senator Borah then remarked:

"Senator Borah: But the hearing is *before a political appointee;* that is, the Internal Revenue Commissioner. It is not before a judicial body but before a political body, and that political body, by its decision, determines whether or not the taxpayer is to have an opportunity in a judicial body."

In the same report Senator Johnson said:

"The report (*i. e.,* the conference report, which is the same as the Act) hedges about the right of the individual in such fashion as to make it extremely difficult for that right to be exercised at all."

(3) *The Provision That No Suit for Refund Under the Agricultural Act as Amended Based Upon the Invalidity of the Tax "Shall Be Maintained in Any Court, Unless Prior to the Expiration of Six Months After the Date on Which Such Tax Imposed by This Title Has Been Finally Held Invalid a Claim Therefore" Is Filed by the Person Entitled Thereto (Sec. 21(d) (2)), Renders Such Remedy Uncertain and Inadequate.*

It is doubtful, under this provision, whether claimant could, at the present time, file any claim or initiate any proceeding for the recovery at law of any tax paid by it. Apparently the initiation of such action must await a decision of the Supreme Court by which the Agricultural Adjustment Act as amended is finally held invalid. This uncertainty as to the availability, at present, of the remedy provided, is sufficient alone to give equity jurisdiction of the present action.

(4) *The Provision That Any Claim Filed for Refund Must Conform "to Such Regulations as the Commisioner of Internal Revenue, With the Approval of the Secretary of the Treasury, May Prescribe" (Sec. 21(d) (2)), in View of the Fact That, as Stated in the Record, No Such Regulations Have Been Prescribed, Renders the Remedy at Law Inadequate.*

As stated in the case of *Fredenberg v. Whitney* (D. C. Wash.), 240 Fed. 819, 822, 823:

> "In these days of industrial expansion, parties should have a *right to have any issue which involves their financial status speedily adjusted*, and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the *party himself controls and can assert at the moment.*"

(5) *The Provision That No Suit or Proceedings Shall Be Begun on Any Claim Before the Expiration of One Year From the Date of Filing Such Claim Unless the Commissioner Renders a Decision Within That Time (Sec. 21(d) (2)) Presents a Further Limitation Upon the Legal Remedy Which, in View of the Facts of This Case, Renders the Legal Remedy Inadequate.*

The limitation prescribed by Section 156 of Title 26, U. S. C. A., which was applicable to all such refund claims prior to August 24, 1935, was six months. The extension of such period for an additional period of six months, in view of the multiplicity of issues necessarily presented by a claim for refund by plaintiff, and the vast amount of detailed evidence necessary to present a claim for each month of the year, renders the remedy provided so inadequate and impracticable as to warrant the interposition of equity.

Until the provisions of the Act have received judicial interpretation by the Supreme Court it is impossible to say what a claimant's rights are. Relief should be granted until all doubt is removed. The Supreme Court has held that any doubt as to the construction or uncertainty as to the operation of a refund statute warrants granting of an injunction against the collection of taxes.

Union Pacific R. R. Co. v. Weld County, 247 U. S. 282, 62 L. Ed. 1110;

Atlantic Coast Line v. Daughton, 262 U. S. 413, 67 L. Ed. 1051.

The amendments in question are entirely novel and constitute a complete departure from existing refund remedies. Obviously, the adequacy of the remedy is seriously impaired, if not entirely destroyed. It follows that, even though more than one meaning may be given to the amendments in question, the remedy therein provided is so uncertain that equity should take jurisdiction until the doubt has been removed through a final decision of the Supreme Court.

The prevention of a full right of review is, in itself, sufficient to constitute the remedy inadequate; likewise, the uncertainty of the provisions and their doubtful constitutionality are, in themselves, sufficient to render the remedy inadequate. The uncertainty of the provisions is strikingly illustrated by the refusal of counsel for defendant to assume a definite position with respect to any of the provisions of the amended Act, or on any of the questions raised involving either the construction or validity of the amendment.

The Supreme Court has repeatedly held that where the meaning of a statute purported to afford a legal remedy is not entirely clear, the claimant should not be required to assume the risk of an unfavorable construction, but should be granted equitable relief.

Davis v. Wakelee, 156 U. S. 680, 687-688;

Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 295-296;

Hopkins v. Telephone Co., 275 U. S. 393, 399;

In *Union Pac. Ry. Co. v. Weld County,* 247 U. S. 282, 285, 62 L. Ed. 1110, 1116, the court said, after referring to decisions under an earlier statute:

> "If that section is still in force *unqualified and unmodified,* the conclusion below that in this case there is a plain, adequate, and complete remedy at law, and therefore that relief by injunction is not admissible, is fully sustained by our decisions.
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> * * * * * * * *
>
> "And if the section has been so qualified and modified that the continued existence of the right originally conferred on the taxpayer is *involved in uncertainty, an essential element of the requisite remedy at law is wanting;* for, as this court has said: 'It is a settled principle of equity *jurisprudence* that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. . . . Where equity can give relief, plaintiff ought not to be compelled to *speculate upon the chance of his obtaining relief at law.*' Davis v. Wakelee, 156 U. S. 680, 688."

In *Atlantic Coast Line v. Daughton,* 262 U. S. 413, *supra,* the court said:

> "But the statute mainly relied upon is a recent one which appears not to have been construed and applied by the highest court of the state. In the absence of such decision we cannot say the remedy at law is plain and adequate."

(B) *A Court of Equity Is Not Deprived of Jurisdiction to Grant Injunctive Relief, Where the Remedy at Law Is Not Equally Plain, Speedy, Complete or Practical, and as Efficient to Attain the Ends of Justice Both in Respect of the Final Relief Sought, and the Mode of Obtaining It, as Is the Relief in Equity.*

In *Cable v. U. S. Life Ins. Co.*, 191 U. S. 288, 303, 48 L. Ed. 188, the court said at page 303 (192):

> "It is true that the remedy or defense which will oust an equity court of jurisdiction must be as complete and as adequate, as sufficient and as final, as the remedy in equity, or else the latter court retains jurisdiction; and it must be a remedy which may be resorted to *without impediment created otherwise than by the act of the party,* and the remedy or defense must be capable of being asserted without rendering the party asserting it liable to the imposition of heavy penalties or forfeitures, *arising other than by reason of its own act.*"

In *Standard Oil Co. v. Atlantic Coast Line R. Co.* (D. C. Ky.), 13 Fed. (2) 633, 635, 636, 637, aff. 275 U. S. 257, 72 L. Ed. 270, the court held that equity could assume jurisdiction of an action to enjoin a railway from charging excess freight over reasonable charges. The court said:

> "It is well settled, however, that, to constitute an adequate remedy at law, the remedy must be as complete, practicable, and as efficient, both in respect to the final relief sought and the mode of obtaining it, as is the remedy in equity. * * *

"No recovery could be allowed a plaintiff in such an action until he had established to the satisfaction of the jury, not only that the rates charged were unreasonable, but the *extent* of their unreasonableness. * * *

"So, in trying to enforce in this court its common-law right of action, the plaintiff would be confronted with *substantial obstacles, with which it is not confronted in this equity action.*"

In *Clark v. Pigeon River Improvement etc. Co.* (C. C. A. 8), 52 Fed. (2) 550, 557, the court said:

"That remedy, however, must be one that is adequate, speedy, plain, and complete, *not an impracticable or theoretical remedy which does not reasonably and fairly meet the situation* to accomplish the purposes of justice."

See also:

Munn v. Des Moines Nat. Bank (C. C. A. 8), 18 Fed. (2) 269, 271;

Atchison, Topeka & Santa Fe R. Co. v. Sullivan (C. C. A. 8), 173 Fed. 456, 470;

Nutt v. Ellerbe (Three-Judge court, S. C.), 56 Fed. (2) 1058, 1063;

Union Pac. Ry. Co. v. Weld County, 247 U. S. 282, 285, 62 L. Ed. 1110, 1116;

Fredenberg v. Whitney (D. C. Wash.), 240 Fed. 819, 822, 823;

Magruder v. Belle Fourche Valley Water Users' Association (C. C. A. 8), 219 Fed. 72, 79;

Jewett Bros. & Jewett v. Chicago M. & St. P. Ry. Co. (C. C. S. D.), 156 Fed. 160, 167.

VI.

The Practical Operation of the Amended Act Will Result in a Multiplicity of Suits or at Any Rate a Multiplicity of Causes Which Will Constitute That Needless, Vexatious and Interminable Litigation From Which Equity Will Grant Relief.

Under the Act as amended, plaintiff will be required to file a claim for refund for each month's tax paid and such claim upon rejection will give a right of action thereon. Whether such actions be brought singly or in groups, the difficulty of the situation as it affects the claimant will be the same. It must prove separately as to each month the amount of tax paid and the circumstances of each purchase and sale during this taxable period. The disadvantage of multiple actions would not be mitigated in the least by delaying action until the causes of action had accumulated or until the end of the statutory period. In any view of the Act as amended the plaintiff is remitted to the choice between utterly ruinous delay and engaging in repeated and prolonged litigation only slightly less ruinous.

That the rule as to multiplicity cannot be narrowly construed is well illustrated by the case of *Hale v. Allinson,* 188 U. S. 56, 47 L. Ed. 380, relied upon by defendant:

> "Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the pre-

vention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided *upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied;* these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on the ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will *practically* prevent a multiplicity of litigation and will be an *actual convenience* to all parties, and will not unreasonably overlook or obstruct the material interests of any."

It is readily seen that an application for refund remedy provided by the Act as amended will result in exactly the same situation as that before the court in *Hill v. Wallace,* 259 U. S. 54, for the reason that the same detail of proof will be required as of each individual transaction.

There may be decisions in which the necessity of monthly suits or presentations of claims has been held not necessarily to result in a multiplicity of suits in the equity sense but we have not been cited to such decisions. The necessity of monthly suits under circumstances involving much less hardship than the refund remedy under discus-

sion has been held to give rise to multiplicity of actions in the equity sense.

Postal Cable Telegraph Co. v. Cumberland T. and T. Co., 177 Fed. 726 (D. C.);

Minnetonka Oil Co. v. Cleveland Vitrified Brick Co., 111 Pac. 326 (Okla.);

Texas Co. v. Central Fuel Oil Co., 194 Fed. 1 (C. C. A. 8), *supra.*

Certainly, if the practical necessity of monthly suits is ever to be regarded as constituting a multiplicity of actions, the present case on this ground alone is a situation where equity will relieve from the hardship of unnecessary and interminable litigation.

The effect of the recent amendments to the Agricultural Adjustment Act is to multiply the difficulties of a refund suit both by its novel requirements of proof of the circumstances of each purchase and sale and by the enforced delay in the institution of the original proceedings and also by the confusing nature of the procedure for prosecution of the claim.

VII.

Section 3224 of the Revised Statutes Does Not Bar Relief and Did Not Require That the Existing Injunction Be Dissolved.

The section reads:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

This language, like the language of section 21 (a) referred to in the succeeding point, is broad enough on its face to bar any injunction suit against the collection of taxes. However, the Supreme Court has held many times that the prohibition of the statute is not absolute.

It is well established that plaintiff's right to injunctive relief is not barred by the provisions of section 3224 of the Revised Statutes if a showing is made of the inadequacy of the legal remedy or of other circumstances bringing the case within a recognized head of equity jurisdiction.

> *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498, 76 L. Ed. 422;
>
> *Skagit County v. Northern Pac. Ry. Co.*, 61 F. (2d) 638 (C. C. A. 9).

As stated in *Miller v. Standard Nut Margarine Co., supra,* it would require a special and particular provision to suggest a construction which would prohibit resort to the relief which equity affords in cases of inadequacy of legal remedy or other exceptional circumstances

In that case the suit was against the Collector of Internal Revenue to enjoin the collection of a tax, and it was defended on the ground that section 3224 was an absolute bar to injunctive relief. The court said at page 506, 507:

> "And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within *some acknowledged head of equity jurisprudence*, a suit may be maintained to enjoin the collector. (Citing cases.) Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests. (Citing cases.) *The section does not refer specifically to the rule applicable to cases involving exceptional circumstances.* The general words employed are not sufficient, and *it would require specific language undoubtedly disclosing that purpose*, to warrant the inference that Congress intended to abrogate that salutary and well established rule. This court has given effect to §3224 in a number of cases. (Citing cases.) It has never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. (Citing cases.)"

It appears, therefore, that where a taxpayer challenges the tax upon constitutional or other grounds going to the entire validity of the tax, the rule of the exception as to special and extraordinary circumstances is particularly applicable. The record in this case presents a situation where the legal remedy is not only plainly inadequate, but

in practical operation necessarily results in a multiplicity of suits. On both grounds the case comes within the category of special and extraordinary circumstances.

Hopkins v. Southern Cal. Telephone Co., 275 U. S. 393, 72 L. Ed. 329;

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 37, 39, 52 L. Ed. 90;

Wallace v. Hines, 253 U. S. 66, 67, 64 L. Ed. 782;

Union Pacific Railroad Co. v. Weld County, 247 U. S. 282, 285, 62 L. Ed. 410;

Atlantic Coast Line Ry. v. Daughton, 262 U. S. 413, 425, 67 L. Ed. 1051;

Wilson v. Illinois Southern Railroad Co., 263 U. S. 574, 576, 68 L. Ed. 456.

In the case of *Hill v. Wallace*, 259 U. S. 462, 68 L. Ed. 822, in an opinion written by Justice Taft, the court said:

> "A further question arises as to whether this is a suit for an injunction against the collection of the tax in violation of §3224, Rev. Stats., in so far as it seeks relief against the District Attorney and Collector of Internal Revenue. *Were this a state act, injunction would certainly issue against such officers* under the decisions in *Ex parte* Young, 209 U. S. 123; Ohio Tax Cases, 232 U. S. 576, 587; McFarland v. American Sugar Refining Co., 241 U. S. 79, 82. Does §3224, Rev. Stats., prevent the application of *similar principles to a federal taxing act?*

> It has been held by this court, in Dodge v. Brady, 240 U. S. 122, 126, that §3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also Dodge v. Osborn, 240 U. S. 118, 122. In the case before us, a sale of grain for future delivery without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back would necessitate a multiplicity of suits and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market in order to test the validity of the act would stop its 1600 members in a branch of their business most important to themselves and to the country. We think *these exceptional and extraordinary circumstances with respect to the operation of this act make §3224 inapplicable.*"

It will be noted that the court specifically holds that the principles governing the exceptions to the application of Section 3224 are the same as those which the Supreme Court had laid down in suits involving injunctions against state taxes.

Whatever may have been the situation prior to the amendments of August 24, 1935, the conditions and burdens placed by the amendment upon the recovery of taxes illegally collected resulted in such special and extraordinary circumstances as to entitle the plaintiff to an injunction pending decision upon the merits.

VIII.

Section 21a of the Amended Act Does Not Bar Relief and Did Not Require That the Existing Injunction Be Dissolved.

Section 21a of the Agricultural Adjustment Act, as amended, provides:

> "SEC. 21. (a). No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title *on or after the date of the adoption of this amendment,* or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section, may be reserved in the court's order."

(1) *Section 21(a) Was Not Made a Ground of Defendant's Motion to Vacate the Temporary Injunction, and Therefore Cannot Be Relied Upon as Supporting the Order Appealed From.*

The provisions of section 21a are not referred to directly or indirectly in the motion to vacate the injunction which was made upon the five grounds set forth. [Armour Tr. pp. 62-64.] The provisions of section 21a were referred to for the *first* time in these proceedings by defendant on the last page of its brief on the application of appellants for injunction pending appeal. The section was not presented to or considered by the trial court at the time of the hearing on the motion to vacate the injunction or at any other time. It is well settled that neither the appellant nor the respondent may suggest on appeal for the first time the ground for either upholding or opposing the ruling of the trial court which was not suggested to the trial court.

Alaska Salmon Co. v. Territory of Alaska (C. C. A. 9), 236 Fed. 62, 63;

Van Norden v. Chas. R. McCormick Lumber Co. (C. C. A. 9), 17 F. (2) 568;

Hercules Powder Co. v. Rich (C. C. A. 8), 3 F. (2) 12.

(2) *The Provisions of Section 21a of the Amended Act Are Limited in Application to Taxes "Imposed" on or After the Date of the Adoption of the Amendment.*

Obviously the phrase "*on or after* the date of the adoption of this amendment" modifies the preceding phrase "any tax imposed, etc." and does not refer back to the

clause beginning "no suit, action or proceeding, etc." The phrase "on or after the date of this act" is placed in a separately numbered subdivision 1, and its arrangement and punctuation indicate that the reference is to the tax rather than to the suit.

The Congressional Committee reports thoroughly indicate that this was the intent of Congress. The House Committee on Agriculture with reference to section 21a (which was then designated as 21b) contained the following:

> "Section 29 contains a proposed new section to the act (sec. 21 (b)), * which specifically denies the right to enjoin or restrain the collection of *any tax under the act imposed after the date of adoption of the amendment*, or to obtain a declaratory judgment in connection with any such tax." (74th Congress, 1st Session, House of Representatives, Report No. 1241, p. 20.)

This section therefore has no application to the present case.

(3) *Section 21(a) Should Not Be Construed, Even as to Future Taxes, as an Absolute Bar to Equitable Relief.*

(a) The section is substantially identical with section 3224 of Revised Statutes, and under well settled rules of construction is to be considered as a re-enactment merely of that statute.

That section 21(a) is a re-enactment of section 3224 is obvious from the fact that the latter section incorporates the *identical* language of the first.

In the following quotation we have set forth the pertinent portion of section 21(a) and have placed in italics the words taken from section 3224 (which are all the words contained in said section 3224).

> "Sec. 21(a). *No suit,* action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) *shall be* brought or *maintained in any court* if such suit, action or proceeding is *for the purpose* or has the effect (1) *of* preventing or *restraining the assessment or collection of any tax . . .*"

The italicized words comprise every word appearing in section 3224. The added words of course have no application to the present case.

As stated in *Hecht v. Malley,* 265 U. S. 144, 153, 68 L. Ed. 949,

> "In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this court to such language, and *made it a part of the enactment.*"

Heald v. District of Columbia, 254 U. S. 20, 65 L. Ed. 106;

Lattimer v. U. S., 223 U. S. 501, 56 L. Ed. 526.

For nearly a century, the Supreme Court had construed section 3224 not as an absolute bar, but as subject to exceptions. To assume that Congress did not intend that section 21(a) should be subject to these well established exceptions is to assume that Congress intended to deprive the processor of any means of questioning the constitutionality of processing taxes.

The purposes of such re-enactment of section 3224 have been suggested to be, among others, the following:

(aa) To extend the provisions of section 3224 to include, not only injunctions in the strict sense, but interlocutory orders in probate, administration, receivership and bankrutpcy proceedings. The solicitor for the Department of Agriculture, Mr. Seth Thomas, expressly stated, at page 23 of his opinion, after quoting section 3224:

"It is the Government's position that if such a provision is valid with respect to suits or proceedings which restrain the collection directly, then a similar provision may be made with respect to suits or proceedings which have *a similar indirect effect.*"

(bb) To make the provisions of section 3224 applicable to processing taxes as such, in order to meet contentions which had been advanced in suits involving the processing tax that the tax was not in fact a tax, which contentions had received judicial sanction in an opinion by Judge Barnes in the District Court of Illinois, and Judge Lindley in the District Court of Indiana.

(cc) To emphasize and call to the attention of the courts the rule established by section 3224 of the Revised Statutes.

(b) The provisions of section 21(a) are not to be extended beyond the clear import of the language used, and in case of doubt, are to be construed most strongly against the Government and in favor of the taxpayer.

Hecht v. Malley, 265 U. S. 144, 68 L. Ed. 949;

Gould v. Gould, 245 U. S. 151, 153, 62 L. Ed. 211.

(c) The fact that section 21(a) is a part of a legislative enactment which provides what was presumably considered a legal remedy, is a further reason for holding that the prohibition of the section does not apply to cases where the legal remedy turns out to be inadequate.

Section 3224 was originally a part of a statute which contained a provision affording a legal remedy, and it was held that the prohibition of the section would not be assumed to be applicable where the legal remedy is adequate.

(d) Under the decisions of the Supreme Court, it would have required specific language to render the prohibition of section 21(a) applicable in cases where the legal remedy is inadequate.

In *Miller v. Standard Nut Margarine Co.* (284 U. S. 498), 76 L. Ed. 422, the Supreme Court specifically stated that the general language of section 3224 was not sufficient to constitute an absolute bar to an injunction against the collection of tax, saying:

> "It would require *specific language undoubtedly disclosing that purpose,* to warrant the inference that Congress intended to abrogate that salutary and well established rule."

In order to comply with the rule of this case, it would have been necessary for Congress, in enacting section 21(a), to have expressly stated in said section that no suit should be brought or maintained, etc., "even though the remedy at law provided in subsection (d) shall not be full, complete or adequate." Only by such language could Congress have expressed beyond doubt its intention to make the prohibition against injunction

absolute. No such language was used. The section is in terms as general, so far as the question of the adequacy of the legal remedy is concerned, as are the terms of section 3224, Revised Statutes. The statement of the Supreme Court in *Miller v. Standard Nut Margarine Co.,* therefore, applies to the provisions of section 21(a) the same as to section 3224.

> *"The section does not refer specifically to the rule applicable to cases involving exceptional circumstances."*

(e) The fact that section 21(a) does not purport to take away *jurisdiction* from the courts, although Congress had the matter specifically brought to its attention when the amendments were under consideration, is also indicative of the absence of any intent to impair equity jurisdiction.

While the Senate Committee recommended specifically that jurisdiction be taken away from the courts in suits to recover prior taxes, *no such recommendation was made with regard to suits to enjoin* the collection of taxes. The question of the power of congress to limit or bar the right of the citizen to test the constitutionality of the act in court was discussed at length on the floor of the Senate, where the following comments, among others, were made:

> "Mr. Borah: I invite the senator's attention to the language of the amendment, which is that 'no federal or state court shall have jurisdiction to entertain a suit.'

"Mr. Logan: Could we deny jurisdiction to a federal court?

"Mr. Borah: I do not think we should take from a citizen *the right to go into court* to test the question of whether he has suffered by reason of the act either of the government or of anyone else.

"I am aware of the fiction which obtains that there must be consent before one can sue the government; that is a matter I shall discuss in a few minutes. But where there has been an actual wrong suffered, a wrong sustained, where property has been taken and rights have been denied, I do not believe we can justly or legally deny a citizen *the right to go into court.* I do not think in all conscience we can deny him *the right to bring a suit.* * * *

"*The matter of procedure* after the suit is brought may be curtailed or limited within reason, but not *the right* of the citizen to sue to test the legality of the federal government or a state, or a citizen of the government or a state." (*Congressional Record,* July 18, 1935, pp. 11,832-3.)

"Mr. Bailey: Mr. President, I am inclined to take the view that we do not have the power under the Constitution to enact such a law as this. We may pass such a statute, but I do not think it will ever be law in America." (*Congressional Record,* July 18, 1935, p. 11,840.)

"Mr. White: The particular language which appears on page 58 relates to a litigant; it undertakes to circumscribe or limit his rights, and it *relates also to the jurisdiction of a court of the United States. More than that, it relates to the jurisdiction of a state court.* Passing over the question of our authority over the jurisdiction of a state court, I wish to direct

a question as to our control over the jurisdiction in all cases of a United States court.

"The Constitution vests the judicial power of the United States in a Supreme Court, and in such courts of inferior jurisdiction as the Congress may create. Then it goes on and provides that this judicial power shall extend, among other things, to all cases arising under the Constitution of the United States.

"I wish someone would answer for me the question whether the testing of the constitutionality of a statute of the United States is not a question arising under the Constitution, and whether the authority of a United States court to pass on that question does not rest in the Constitution itself rather than upon a statute of the United States. Assuming that to be true, I next desire to ask whether we can take from one of the courts of the United States its jurisdiction to pass on the constitutionality of a statute of the United States.

"Personally, while I think we may do many things —we may limit in many ways, perhaps, the right of action—I have very serious doubt whether we can say to a United States court, the source of its power being in the Constitution, *'You shall not have jurisdiction* to answer the question whether a statute of the United States is or is not within the purview of the Constitution of the United States.'" (*Congressional Record,* July 18, 1935, pp. 11846-7.)

"Mr. George: * * * In other words, Mr. President, the provision in question is not precisely nor exactly a denial of consent to be sued, but *it is rather the denial of the jurisdiction of the court to entertain the suit."* * * * (*Congressional Record,* July 19, 1935, p. 11913.)

In the debates of August 15, 1935, Senator Johnson said:

> "I can only voice the objection that is mine, and to say that I do not approve, and that I regret exceedingly that we have gone so far as we have in this conference report *in the endeavor to deprive the ordinary American of access to the courts of the land.*"

There was no provision in the act as passed taking away jurisdiction from the courts, the committee report proposing such action having been rejected. If Congress had intended to deprive the courts of jurisdiction in actions to enjoin the collection of processing taxes, it would not have rejected the specific language of the Senate committe report containing this provision.

> *Fox v. Standard Oil Co.,* 294 U. S. 87, 79 L. Ed. Adv. Sh. 339.

(f) *Section 21(a) Should Not Be Construed as Taking Away the Jurisdiction of the Courts, for the Reason That it Applies, by Its Terms, Not Only to Federal but to State Courts. The Prohibition Runs to an Action "in Any Court".*

It cannot be assumed that Congress intended to prohibit injunctive relief in any court, whether state or federal, to a processor who might otherwise be entirely without remedy.

(g) *Section 21(a) Must Be Construed in the Same Manner as Section 3224, and Subject to the Same Exceptions and Applied Only Where the Legal Remedy Is Adequate, Otherwise the Fifth Amendment Is Violated.*

Any other construction would have the effect of taking property from the taxpayer without due process of law and would involve the Act in such serious constitutional doubt as to compel the rejection of such construction.

Graham & Foster v. Goodcell, 282 U. S. 409, 75 L. Ed. 415;

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107.

"But, as this court often has held, 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score.' "

Panama Railroad Co. v. Johnson, 264 U. S. 748, 754, 68 L. Ed. 755.

The taxpayer's right to litigate the question of the validity of a tax *with the Collector of Internal Revenue,* is a property right which is protected by the due process clause, and against which the principle of the immunity of the sovereign from suit has no application.

Lipke v. Leiderer, 259 U. S. 557, 559, 562, 66 L. Ed. 1061, 1064;

Phillips v. Commissioner, 283 U. S. 589, 75 L. Ed. 1289;

Regal Drug Corp. v. Wardell, 260 U. S. 386, 391, 67 L. Ed. 318;

Ettor v. Tacoma, 228 U. S. 148, 57 L. Ed. 773.

If Section 21(a) is construed as an absolute bar to injunction suits, regardless of the adequacy of the legal remedy, clearly it is unconstitutional to the extent that plaintiff is deprived of a substantial remedy and plaintiff's property is confiscated in violation of the Fifth Amendment. Accordingly, the decisions of the Supreme Court which required that Section 3224 be construed not as an absolute bar, but as applicable only where an adequate legal remedy is available, likewise require that the provisions of Section 21(a) be construed as constituting not an absolute bar, but one applicable only when the legal remedy proves adequate. There is no reason whatever for construing Section 21(a) in any other manner than Section 3224. The court retains the same jurisdiction under Section 21(a) as it has under Section 3224 of Revised Statutes.

As pointed out in *Gold Medal Foods, Inc. v. Landy* (D. C. Minn—Three Judges), decided October 22, 1935:

> "It is reasonable to believe that Congress in passing Section 21(a), presumed that every taxpayer was afforded an adequate and complete remedy at law. The history of our tax legislation justifies the conclusion that section 21(a) is bottomed on that assumption. The taxpayer's right to have the legality of a tax and his right to refund determined in a court of law has always been recognized as inviolate. It is repugnant to one's sense of justice and fairness that a taxpayer should be required to pay a tax, which he in good faith urges is unconstitutional,

and then by reason of legislation, be prevented from obtaining a determination as to its constitutionality. Under the present Act, Congress denies the taxpayer any right to recover a refund unless he complies with the conditions and pronouncements which are to be found in Section 21(d) (1). If the plaintiffs are right in their contention that the Government, in light of all the circumstances, has demanded proof of facts that are impossible to prove, in what manner can the taxpayer ever procure a ruling on the constitutionality of the law? The Federal Declaratory Judgment Act is denied him, and the Government asserts that he has no remedy in equity. If he cannot prove damages as demanded by this section, the constitutionality of the Act in any proceeding at law will become moot, notwithstanding the fact that damage and serious loss may have resulted to the taxpayer by the exaction of the tax. It must be recognized that, where a taxpayer has been required to pay an illegal tax, the mere fact that he has been or will be able to recoup such payment from a third party, will not preclude him from resorting to equity to restrain the collection of a tax where there is an utter absence of any remedy at law. If Congress has set up provisions that are impossible of performance, as claimed, then obviously the taxpayer is not only deprived of an adequate and complete remedy at law, but he has no remedy at all. The argument urged by the Government that, by the passage of Section 21(a), Congress intended to deprive the United States courts of any jurisdiction to entertain any suit in equity is not tenable."

In the case of *A. P. W. Paper Company, Inc. v. Riley,* (D. C. N. Y.—decided October 18, 1935, by Judge Cooper), the court said:

> "That in a tax law Congress may forbid injunction where it gives adequate remedy at large to recover illegally collected taxes, is well settled.
>
> "But that the Congress may by unconstitutional statutes denominated a tax law, take the property of the citizen without due process of law and then in the same statute forbid the citizen to seek injunction in a Court of Equity without giving him an adequate remedy at law, has yet to be established by highest authority. There are authorities which at least inferentially hold to the contrary."

The right to secure declaratory judgments in tax cases has been withdrawn. It is contended that section 21 (a) bars access to courts of equity. If this contention is upheld Congress may, by unconstitutional legislation, under the guise of a tax law, take the property of the citizen and retain it by the mere device of prohibiting redress at law or suit in equity against such legislation. There would be an end of constitutional government. Legislation thus nullifying the constitution will not be upheld in a court of equity.

IX.

Defendant's Contention That Plaintiff Has Been Guilty of Laches Is Entirely Without Basis in the Record. No Facts Are Presented Showing That Defendant Has Changed Its Position or Has Been Prejudiced in Any Manner.

Defendant asserted in the prior hearing that the plaintiffs herein have been guilty of laches. It is difficult to understand in what manner such fault can be attached to the plaintiffs. The plaintiffs have paid their taxes so long as no grave doubt was shown as to the validity of the law under which the taxes were levied, assessed and collected. The defendants here are not in a position to assert that the plaintiffs had no right to assume that a law enacted by Congress was a valid exercise of legislative power as granted to it by the Constitution. The plaintiffs were not advised of or given notice in any manner or charged with any notice of any act whereby the position of the defendants was in anywise changed. Defendant has not at any stage of the case offered any evidence or made any showing whatsoever as to any facts upon which to base its contentions on this issue. There was no showing before the court at the hearing of the motion to vacate the temporary injunction, and there are no facts in the record whatsoever which indicate or tend to indicate any change of position on the part of the Government or any injury sustained by it. It cannot be successfully maintained that plaintiffs are obligated to pay taxes unless there is a valid, statutory

enactment for the assessment levied and the collection of a tax. If the enactment was invalid it has not acquired validity through any delay on the part of plaintiffs.

This point was considered in the case of *Gebelein, Inc. v. Milbourne,* (D. C. Md.) where the court said:

> "It would seem rather that the taxpayer is entitled to credit for its effort to cooperate with the Government in paying the tax so long as it was financially possible for it to do so."

The question of laches, though not set forth as a ground by the defendants in the original motion to dismiss, was nevertheless urged at the time the motions were heard upon the respective judges of the District Court and fully presented before the denial by said judges of the motion to dismiss herein.

Conclusion.

Without further extending this brief—to excuse the length of which we can only suggest the novelty of the legislation and the complexity and importance of the questions of law and fact involved in the consideration of the validity, construction and operation of the statutes—we submit that the points herein advanced, considered together, entitle plaintiffs to have the injunctions continued in force. The admitted existence of serious doubt as to the constitutionality of the entire Act as well as to the validity and construction of the amendments to the Act and the uncertainty and ambiguity of the refund provisions, together with the showing of impossibility of making the proof which is required in order to recover a refund, the certainty of irreparable loss to the plaintiffs if the temporary injunction is not continued in effect, and the fact that plaintiffs, if the present appeal is denied, will be deprived of all opportunity of obtaining a judicial determination of the important questions involved—considered with the fact that the Government is not injured by the injunctions—require that the *status quo* be preserved pending hearing on the merits.

Plaintiffs are entitled to a reversal of the order appealed from for the additional reason that the order, on its face, shows that the trial court declined to exercise any discretion in passing upon the motion. The action of the trial court was not taken in view of any change of circumstances, nor was any change of circumstances shown which indicated or tend to indicate in any way that equitable relief was not appropriate. The order appealed from was made without any consideration of the circumstances re-

lied upon as warranting the retention of the injunction, but solely by reason of what the trial court erroneously considered to be the mandatory nature of the decision of this court in *Fisher Flouring Mills v. Vierhus,* and without any showing by defendant of any change in circumstances, or any showing of fact whatsoever.

It is respectfully submitted that the order appealed from should be reversed.

Respectfully submitted,

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APPENDIX.

Section 21 of the Agricultural Adjustment Act, Added by Section 30 of the Act of Congress of August 24, 1935.

Sec. 21. (a) No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under this title on or after the date of the adoption of this amendment, or (2) of obtaining a declaratory judgment under the Federal Declaratory Judgments Act in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section, may be reserved in the court's order.

(b) The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual

of all such taxes (together with penalties and interest with respect thereto) prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress. All such taxes which have accrued and remain unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to section 19, and to the provisions of law made applicable thereby. Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment.

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(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the com-

modity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall

establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made was included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefore (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part

of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy.

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(g) The provisions of section 3226, Revised Statutes, as amended, are hereby extended to apply to any suit for the recovery of any amount of any tax, penalty, or interest, which accrued, before, on, or after the date of the adoption of this amendment under this title (whether an overpayment or otherwise), and to any suit for the recovery of any amount of tax which results from an error in the computation of the tax or from duplicate payments of any tax, or any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title or any refund or credit to the processor of any tax paid by him with respect to articles exported pursuant to the provisions of section 317 of the Tariff Act of 1930.